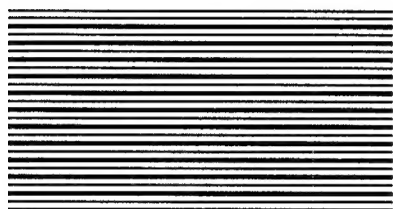




**US Army Corps  
of Engineers®**

## **Working Paper #8**

ALTERNATIVE DISPUTE  
RESOLUTION SERIES



# **PARTNERING, CONSENSUS BUILDING, AND ALTERNATIVE DISPUTE RESOLUTION Current Uses and Opportunities in The U.S. Army Corps of Engineers**

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IWR Working Paper 96-ADR-WP-8

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***The Corps Commitment to  
Alternative Dispute Resolution (ADR)***

*This working paper is one in a series of working papers describing techniques for Alternative Dispute Resolution (ADR). This series is part of a Corps program to encourage its managers to develop and utilize new ways of resolving disputes. ADR techniques may be used to prevent disputes, resolve them at earlier stages, or settle them prior to formal litigation. ADR is a new field, and additional techniques are being developed all the time. These working papers are a means of providing Corps managers with up-to-date information on the latest techniques. The information in this working paper is designed to provide a starting point for innovation by Corps managers in the use of ADR techniques. Other case studies and ADR working papers are available to assist managers.*

*The current list of pamphlets, case studies, and working papers in the ADR series is shown on the inside back cover of this working paper.*

*The ADR Program is carried out under the proponentcy of the U.S. Army Corps of Engineers, Office of Chief Counsel, Lester Edelman, Chief Counsel, and with the guidance of the U.S. Army Corps of Engineers' Institute for Water Resources (IWR), Alexandria VA. Frank Carr serves as ADR Program Manager. Jerome Delli Priscoli, Ph.D., Senior Policy Analyst of IWR currently serves as Technical Monitor, assisted by Donna Ayres, ADR Program Coordinator. James L. Creighton, Ph.D., Creighton & Creighton, Inc., serves as Principal Investigator of the contract under which these working papers are produced.*

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***PARTNERING, CONSENSUS BUILDING, AND  
ALTERNATIVE DISPUTE RESOLUTION***  
***Current Uses and Opportunities in the U.S. Army Corps of Engineers***

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**Alternative Dispute  
Resolution Series**

**Working Paper #8**

Prepared by  
The Consensus Building Institute

for  
The Office of Counsel &  
The Institute for Water Resources  
The U.S. Army Corps of Engineers

May 1996

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## **1 - EXECUTIVE SUMMARY**

The U.S. Army Corps of Engineers has been a consistent innovator among federal agencies in its efforts to prevent and manage conflict. Over the last twenty years, Corps Headquarters and field staff have employed three techniques -- partnering, consensus building, and alternative dispute resolution -- to better manage conflicts among the Corps' own employees, and between the agency and many contractors, communities, advocacy groups, and local, state and federal agencies.

Partnering has been used extensively in hundreds of construction projects to help improve relationships, better coordinate work, and prevent conflict. Consensus building, a means to prevent and resolve conflict through face-to-face negotiations among stakeholders, has been used to generate widespread community support for the Corps' plans, projects, and permits. Alternative dispute resolution, from structured negotiations to highly specialized mini-trials, has been employed to resolve numerous disputes over construction claims, environmental clean-ups, and the granting of regulatory permits. The successful use of these three techniques by Corps staff has clearly demonstrated that conflict is neither inevitable or unresolvable.

However, despite the Corps' successful use of conflict management techniques during the past twenty years, the work of fully integrating these techniques into its day-to-day activities is not yet complete. Their use still remains sporadic in some districts and functional divisions. This is especially true of consensus building and ADR, which have not been as well-assimilated into the culture of the agency as partnering. At the same time, the need for effective conflict management techniques may well be increasing. As the Corps grapples with restructuring, downsizing, and general skepticism about expanded roles for the military and the entire federal government, the agency is likely to confront additional conflict both internally and in its external relationships with stakeholders, customers, and contractors.

Our research suggests that the Corps stands at a crossroads. As the agency faces an increasing need for managing conflict well, will these techniques continue to be used in many, but not all, districts and divisions? Or, as successful experience accrues, will the Corps find ways of further institutionalizing these techniques so that the agency can prevent floods, construct military structures, keep navigable waterways well-maintained, and protect wetlands without getting bogged down in costly litigation and inter-agency squabbling?

In this report, we first describe the past and current uses of partnering, consensus building, and alternative dispute resolution in the work of the Corps, building on case studies from districts across the country. We explore the benefits and costs of these three techniques, and identify the remaining



barriers that may impede their wider use. Where barriers derive from misconceptions, we have attempted to provide a well-reasoned corrective explanation. We also highlight opportunities where partnering, consensus building, and ADR might be used to manage conflicts that currently prevent the Corps from fulfilling its diverse responsibilities. Finally, we make recommendations for improving upon the use of the three techniques and further institutionalizing them into the day-to-day work of the U.S. Army Corps of Engineers.

## **1.1 Methodology**

This report was commissioned by the Institute for Water Resources in conjunction with the Chief Counsel of the Corps. The sponsors pinpointed potential areas within the Corps where partnering, consensus building, and ADR have been or might be used. They also identified staff at Corps Headquarters who could provide information about specific uses of these techniques, as well as access to past research. We developed an interview protocol, and then conducted twenty-five one-hour, in-person interviews with each of the individuals identified by the sponsor (see *Appendix A* for sample interview questions).

Upon completion of the first round of interviews, we sought further details about specific uses of partnering, consensus building and alternative dispute resolution in fifty telephone interviews with district staff recommended to us by those we interviewed at Headquarters. (see *Appendix B* for sample interview questions). These staff included Chiefs of Construction, District Counsels, Chiefs of the Regulatory Branch, Project Managers, and others. Finally, we conducted ten in-person interviews with high ranking officials in the Corps' major directorates, divisions, and branches. To encourage informal, open and honest discussion, we prefaced our interviews by stating that no comments would be attributed to particular individuals. Therefore, the names of the individuals interviewed have not been included in the text.

## **1.2 Definitions**

While we offer the following definitions of the three techniques, we approach these definitions with caution. Often, an effort by Corps staff to help prevent or resolve a conflict will include elements of more than one technique. Moreover, during a long-term, on-going project, one technique may often blend into another. While nomenclature is important, what matters most in the end is not theoretical categorization, but practical application.

*Partnering*, as practiced by the Corps, is a purposeful effort to structure a collaborative, problem-solving relationship with a contractor during the performance of a military or civil construction



contract. Through a team building approach to project management, partnering aims to replace what once were often adversarial interactions between the Corps and its contractors with better working relationships.

*Consensus Building* encompasses a variety of processes such as facilitated workshops, community advisory committees, and policy dialogues. The goal of consensus building is to solve problems before disputes erupt, by bringing multiple stakeholders face-to face to engage in informal, voluntary dialogue and joint decision-making. The term stakeholder refers to any individual or institution that has identifiable concerns about the outcome of a decision or an action. In the work of the Corps, stakeholders typically include industry groups, environmental groups, local, state or federal agencies, and members of the public who believe their homes or communities may be affected by Corps' projects.

*Alternative Dispute Resolution (ADR)*, now well established in the American legal system, encompasses a broad range of techniques for settling disputes while avoiding costly, time-consuming litigation. ADR offers alternatives to the adjudicatory process. In contrast to litigation, ADR efforts are designed to bring about settlement more quickly and cost-effectively, preserving rather than terminating relationships.

### **1.3 Current Uses**

We have identified the following past and current uses of partnering, consensus building, and alternative dispute resolution in the U.S. Army Corps of Engineers. Sections three, four and five of this report describe the Corps' application of each of these techniques in greater detail. We also include brief case studies from districts across the country to highlight innovative and successful uses of the techniques.

#### **1.3.1 Partnering**

- *In Construction Contracts.* Partnering has been used extensively in construction contracts in the Directorates of Civil Works and Military Programs.
- *With the Corps' Customers.* In recent years, the Corps has begun to include the "customer" in partnering sessions with its contractors.
- *With Professional Associations.* Buoyed by the success of partnering in military and civil contracts, the Corps has turned to partnering to improve relationships with organizations and associations representing not one, but multiple contractors or customers.



- *With Other Government Agencies.* The Corps has entered into memoranda of understanding with numerous other federal agencies in an effort to clarify roles and responsibilities, and to formulate guidelines for working together.

### 1.3.2 Consensus Building

- *Coordination and Problem Solving with Local Sponsors.* Corps Project managers have employed a variety of consensus building techniques in an effort to work out the details of planning, design and construction with local sponsors during Civil Works projects.
- *In Planning.* For the past twenty-five years, the Corps has undertaken several comprehensive efforts to involve stakeholders in the planning phase of major and highly contentious Civil Works projects.
- *In Project Management.* In recent years, project managers have begun changing the way that the agency interacts with stakeholder groups. In some instances, they have convened meetings with one stakeholder group at a time. In other cases, project managers have convened ad hoc local committees to represent stakeholder interests in on-going meetings with agency staff.
- *In 404 Permitting.* Corps Regulatory staff in several districts have used consensus building techniques during the general permitting process.
- *In Environmental Restoration.* Corps staff in the Military Program's Environmental Restoration Division have used consensus building techniques to improve communication with community stakeholder groups during the clean-up of hazardous waste sites.
- *In Policy Making.* While consensus building efforts are often centered around a particular project or permit, the process of enlisting stakeholders in decision-making has also been utilized to help the Corps develop broader policies and policy direction at the district, division, and headquarters levels.

### 1.3.3 Alternative Dispute Resolution (ADR)

- *Structured Negotiations* have been used primarily to help resolve disputes arising in Civil Work contracts, and in enforcement actions and permitting in the Regulatory Division of Civil Works.
- *Mediation and Facilitation.* Facilitation by neutrals has been used to help resolve costly and complex disputes over the environmental clean-up of toxic waste sites. Mediation by neutrals has



been used by the Corps to resolve disputes over contract claims in both Military Programs and Civil Works, and to deal with internal claims.

- *Mini-Trials*, are used most often to resolve disputes over contract claims arising in military and civil construction projects.
- *Expert Fact-Finding* has been utilized to help resolve disputes between the agency and its contractors in both Civil and Military Programs.
- *Non-Binding Arbitration* has been used primarily to resolve contract claims in Military and Civil Works construction projects. It has also been used to settle appraisal disputes in the Real Estate Division.
- *Dispute Review Boards* have been used to resolve multiple conflicts that arise during the course of a Military or Civil construction project.

## **1.4 Analysis**

We have identified the following benefits of partnering, consensus building, and alternative dispute resolution, as well as some of the remaining barriers that impede their wider use. In sections three, four and five of this report, each of the points below are discussed at some length, with frequent references to the interviews we conducted with Headquarters and field staff.

### **1.4.1 Partnering**

- Partnering has helped to improve working relationships, reduce claims, and ensure that projects are completed on-time and within budget.
- Partnering is well on its way to becoming an integral part of the Corps' business practices.
- Partnering has been widely used because of its cost effectiveness, because there has been minimal high-level interference, and because it is compatible with existing "best practices."
- Partnering has raised concerns about the Corps' traditional arms-length relationship with contractors.
- High expectations for partnering's success can place undue pressure on field staff to settle disputes.



- Partnering can lose its effectiveness when applied too broadly to areas far from its origins in construction contracts.

#### 1.4.2 Consensus Building

- The use of consensus building tools to minimize conflict and improve the work of the Corps is increasing.
- Consensus building produces significant benefits that enhance both the quality of the Corps' work and the agency's relationships with local sponsors and other stakeholders.
- The use of consensus building techniques may be constrained by concerns about cost effectiveness, fear of losing authority, the traditional culture of the Corps, and conflicting agency mandates.

#### 1.4.3 Alternative Dispute Resolution (ADR)

- ADR has played an important role in reducing the Corps's involvement in litigation and formal administrative hearings.
- Dispute systems design, a systematic effort to re-engineer procedures for dispute handling, is substantially improving the work and efficiency of the Corps.
- Despite these successes, ADR has not been as widely accepted as partnering.
- Leadership and flexibility have facilitated a more active use of ADR in some districts and divisions.

### 1.5 Opportunities

We have identified the following opportunities for the future use of partnering, consensus building, and ADR. In sections three, four and five, we explore these opportunities further and make recommendations for how the Corps might take advantage of them.

#### 1.5.1 Partnering

- Partnering can be used to further improve relationships between the Corps and other federal and state agencies with overlapping regulatory mandates.



- Partnering can be used more frequently to improve relationships between the Corps and its contractors in smaller contracts ranging from \$100,000 to \$1 million.
- Partnering can be used more frequently to help the Corps develop a better relationship with local cost-sharers.

### **1.5.2 Consensus Building**

- The use of consensus building during the preparation of reconnaissance studies can be expanded.
- Consensus building can be used more frequently at various stages in the development of projects, from the preparation of feasibility studies through final design and construction.
- The use of consensus building in general permitting and policy-making can be broadened, to aid the Regulatory Branch of Civil Works in protecting the nation's wetlands.

### **1.5.3 Alternative Dispute Resolution**

- The use of ADR in settling contract claims can be expanded in those offices that have not yet fully utilized these tools.
- Specially designed ADR procedures are needed for handling small construction claims ranging under \$100,000.
- The Regulatory Branch of Civil Works could broaden the use of ADR in both permitting and enforcement.
- The Real Estate Division has numerous disputes which may be amenable to resolution through ADR.

## **1.6 Recommendations**

We have developed the following recommendations. In sections three, four and five of the report we explain these recommendations for partnering, consensus building, and alternative dispute resolution, in particular.

In these recommendations we emphasize top level action and training for field and district staff. The Corps may not be able to implement each and every step we suggest. Senior managers must allocate





scarce resources carefully. It is important, though, that the long-term "return" on investment that these techniques provide not be ignored. Return should be measured not only in terms of time and money saved, but also in terms of improved working relationships and enhanced agency reputation.

#### 1.6.1 Leadership

If partnering, consensus building, and ADR are to be incorporated into these day-to-day work of the Corps, senior managers, in addition to the Chief Counsel, Director of EEO, and Chief of Military Construction, must exercise leadership. While tools will be used in the field and at the district level, Corps managers who initiate, adapt, and implement these tools need assistance from headquarters. Senior managers can clarify and reinforce the use of these techniques. They can persuade and encourage those district offices that have not yet tried out these approaches. They can recognize Corps personnel who have been successful in preventing or reducing conflict, ensuring that innovations become models for the rest of the organization. Finally, they can supply sufficient resources to carry out the work that needs to be done. To exercise leadership, the Corps should:

- Issue a policy statement setting expectations about the benefits of partnering and making explicit the link between partnering's goal of conflict prevention and ADR's goal of conflict resolution.
- Revise and reissue Regulatory Guidance Letter 87-4 to provide-up-to-date guidance for regulatory staff about potential uses for partnering and ADR.
- Urge district commanders, counsels, and contracting officers to consider using ADR as part of the standard processing and evaluation of claims.
- Recognize the project manager's role in improving the agency's complex relationships with customers and stakeholders.
- Develop and clarify the concept of consensus building through a pamphlet prepared by IWR similar to the Working Paper series on ADR.
- Develop a brief version of this report for widespread dissemination throughout the agency.

#### 1.6.2 Internal Communication

The Corps needs to ensure that staff have ample opportunities to communicate with one another about the lessons learned, mistakes made, and successes achieved in the implementation of partnering, consensus building, and ADR. Currently, staff working in different functional and geographic areas of the Corps do not have sufficient opportunities to learn from their colleagues.



- Encourage the use of specific "notes" on partnering, consensus building, and ADR in existing newsletters, using "Partnering Notes" in the Military Program's Construction News as a model.
- Establish an electronic bulletin board to host discussions about these techniques on the agency's new electronic mail system. Each group of personnel (e.g. project managers, study managers, or regulatory staff) should have their own bulletin board, enabling them to communicate with colleagues around the country.
- Provide opportunities for networking at numerous Corps' conferences and trainings through lunches, breaks, and evening activities focused specifically on these three techniques.
- Prepare case studies on consensus building efforts in Regulatory, Project Management, and Planning.

#### 1.6.3 External Communication

The Corps should continue to build, maintain, and improve relationships with its numerous customers and regulatees, and with other federal and state agencies. To help accomplish this, the Corps should:

- Sponsor a national conference for Regulatory staff and their constituents. The Portland District's Environmental Advisory Board and the recent national conference for Corps customers sponsored by the Division of Programs and Project Management could serve as models.
- Partner with other federal agencies such as the EPA, Fish and Wildlife, and the Federal Highway Administration, that have similar or overlapping authorities. The national and regional partnering between the Corps and numerous ports across the country could serve as a useful model for these efforts.

#### 1.6.4 Skill-Building

Without a toolbox of skills, staff will be ill-prepared to implement new approaches to preventing and resolving conflict. The skills needed include: (1) nuts and bolts techniques for negotiation, agenda planning, meeting management, facilitation, and dealing with difficult people; (2) more comprehensive process design skills; and, (3) even more sophisticated skills in dispute systems design which prepare staff to design comprehensive programs for managing streams of reoccurring disputes. The Corps ought to consider a train-the-trainer model to save money and make training opportunities available to the widest possible circle of people within the agency.



To develop nuts and bolts skills, the Corps ought to:

- Train Regulatory, Project Management, Principal Assistants Responsible for Contracting (PARC), and Planning staff in basic negotiation, meeting management, and facilitation through tailored training centered around case studies and simulations that draw from the day-to-day experiences of the trainees.
- Train Division and District attorneys in ADR theory, techniques, and implementation. Such training should stress ways of overcoming internal and external resistance to the use of ADR.
- Train Construction and Regulatory staff in the basic elements of ADR, preferably incorporating this training into more general training efforts.

To develop process skills, the Corps ought to:

- Train Project Managers, Chiefs of Planning, and Chiefs of the Regulatory Branch on how to design consensus building processes. Such training would stress conflict assessment, facilitation, group dynamics, and media relations.

To develop sophisticated disputes systems design skills, the Corps ought to:

- Train key managers who by virtue of their position handle numerous disputes across many projects (such as Contracting Officers and District and Division Counsels) in the methods of dispute systems design.

#### 1.6.5 Resident Expertise

While training is essential, specialized advisors are needed to provide encouragement and support, and to serve as a resource for others within the agency. In order to establish resident expertise, the Corps ought to:

- Create an ADR Advisor position in the Chief Counsel's office to teach training courses, provide advice, and pursue evaluation of Corps dispute resolution efforts.
- Utilize dispute resolution teams. A dispute resolution team should be established to develop a partnering and ADR program for small construction contracts and claims administration. The ADR Teams used to develop and implement the EEO mediation program can serve as a model.
- Establish a mentoring program to link attorneys experienced in ADR with other attorneys who have little to no experience with these techniques.



#### 1.6.6 Professional Assistance

Corps staff need help identifying and evaluating potential facilitators, mediators, and dispute systems design consultants. The Corps should:

- Prepare a "consumer guide" for interested Corps staff summarizing the most important qualifications to look for in a neutral (see *Appendix C* for a sample guide from the Ohio Commission on Dispute Resolution).
- Each division or district should prepare a directory of neutrals in their area who have the experience and skills to effectively orchestrate partnering, consensus building, and ADR. In order to avoid bidding complications, the directory would include all firms who wanted to be listed as long as they provided the basic information regarding educational background, past experience, services offered, and references.
- The Corps ought to provide staff in the field and in the districts a standard evaluation form for reviewing the work of neutrals.

#### 1.6.7 Critical Reflection

Monitoring and evaluation of existing programs are essential. While management must take care to respect the decentralized nature of the Corps, gathering more specific data on past efforts is important. The Corps ought to:

- Systematize data collection and analysis of partnering and ADR.
- Prepare additional case studies that highlight both the strengths and weaknesses of specific partnering, consensus building, and ADR techniques.



## 2 - INTRODUCTION

The purpose of this study is to explore the past, current and potential uses of three techniques for preventing and managing disputes in the U.S. Army Corps of Engineers: (1) partnering; (2) consensus building; and (3) alternative dispute resolution (ADR). We describe their past and current uses in the work of the Corps, building on case studies from districts across the country. We explore their benefits and their costs, and identify the remaining barriers that may prevent their wider use. Finally, we show how partnering, consensus building, and ADR might be used to manage conflicts that currently impede the Corps from fulfilling its diverse responsibilities, from regulating the nation's wetlands, to constructing military or civil projects, to carrying out research studies.

The information in this report is based on more than eighty interviews with Corps personnel, including high-ranking officers at headquarters and staff in numerous districts and divisions across the country. Through these interviews, we found that:

- Many Corps staff, in the case of partnering, and at least some Corps staff, in the case of consensus building and ADR, have substantial experience using these tools.
- The ability of Corps staff to adapt these tools to their particular needs is impressive.
- However, despite many successes, the opportunities to use these tools are by no means fully realized. The extent of their use varies from district to district and division to division.

Partnering, consensus building, and ADR have clear benefits. They can reduce the agency's involvement in protracted inter-agency conflicts, formal administrative appeals, and litigation. This can save the Corps both time and money. Moreover, they can improve working relationships, retain decision-making and conflict management responsibilities at the lowest levels of the organization, and enhance the agency's reputation in the world-at-large.

The Corps developed a reputation as early as the 1970's as a leader among federal agencies in public involvement (see *Stuart Langton's "An Organizational Assessment of the U.S. Army Corps of Engineers in regard to Public Involvement Practices and Challenges," January 1994*). In the mid 1980's, the Corps was the first federal agency to develop a comprehensive ADR program for handling contract disputes. District staff in some districts across the country began using mediation, mini-trials, non-binding arbitration, and dispute review boards to resolve disputes with contractors. In the late 1980's, the Corps once again took a leadership role in partnering major contracts with its



contractors in order to improve working relationships and minimize formal contract claims (see *Administrative Conference of the United States' "Toward Improved Agency Dispute Resolution: Implementing the ADR Act," February 1995*).

For over twenty years, the Corps has been a major innovator among federal agencies in the use of conflict management tools. However, despite this strong and innovative leadership, the work of fully integrating these techniques into the Corps' day-to-day activities is not yet complete. The use of these techniques still remains sporadic in some districts and functional divisions. This is especially true of consensus building and ADR, which have not been as well-assimilated into the culture of the agency as partnering. We have tried to explain why this is so. Where appropriate, we have made recommendations for overcoming the barriers to expanded use of all three techniques. Where barriers derive from misconceptions, we have attempted to provide a well-reasoned corrective explanation.

Our interviews suggest that the Corps is at a crossroads. Although partnering, consensus building, and ADR have been used successfully, there remain obstacles to their expanded use. At the same time, the need for effective conflict management techniques is increasing. As the Corps grapples with restructuring, downsizing, and general skepticism about expanded roles for the military and the entire federal government, the agency is likely to confront additional conflicts both internally and in its external relationships with stakeholders, customers, and contractors. Faced with an increasing need to manage conflict well, will the agency continue to use these tools in some, but not all, districts and divisions? Or, as successful experience accrues, will the Corps find ways to further institutionalize the use of these tools throughout its functional divisions and districts?

## **2.1 Three Key Techniques: Partnering, Consensus Building, and Alternative Dispute Resolution**

While we offer definitions below, we approach these definitions with caution. It is difficult to bound these categories. Often, an effort by Corps staff to help prevent or resolve a conflict will include elements of more than one technique. Moreover, during a long-term, on-going project, one technique may often blend into another. While nomenclature is important, what matters most in the end is not theoretical categorization, but practical application.

### **2.1.1 Partnering**

As developed by the Corps, partnering is a purposeful effort to structure a collaborative, problem-solving relationship with a contractor during the performance of a military or civil construction contract. Through a team building approach to project management, partnering aims to replace what



are often adversarial interactions between the Corps and its contractors with cooperation. The vehicle for affecting this change is a series of planned meetings which bring together key project management staff from both "sides" at regular intervals. These meetings provide an opportunity for staff to become better acquainted, to communicate on a regular basis, and to work through problems before they escalate into acrimonious disputes. Partnering works to prevent conflict by enhancing both the Corps' and the contractors understanding of the others' basic interests, and by encouraging careful discussion about how the difficult issues which inevitably arise during construction will be managed. When conflicts do occur, a well-established orientation towards joint problem-solving often enables staff to resolve them before they escalate.

### 2.1.2 Consensus Building

Consensus building encompasses a variety of processes such as facilitated workshops, community advisory committees, and policy dialogues. Consensus building involves informal, voluntary dialogue that brings multiple "stakeholders" together face-to-face. The term stakeholder refers to any individual or institution that has identifiable concerns about the outcome of a decision or an action. In the work of the Corps, stakeholders typically include industry groups, environmental groups, local, state or federal agencies, and members of the public who believe their homes or communities may be affected by Corps' projects.

Consensus building can help Corps staff to manage conflict with stakeholders by offering them a clear channel to voice their ideas and concerns and by giving them an opportunity to ensure that agency decisions take account of those ideas and concerns. For example, it can prevent future disagreements by inviting stakeholders to participate in shaping a controversial plan or policy. Or, consensus building techniques can be used to resolve ongoing disputes by bringing stakeholders together to discuss their differences and to search for ways of meeting the interests of all parties. Often, the forum for consensus building is an ad-hoc assembly representing all the stakeholders concerned about a particular problem or agency decision. These meetings may be managed by a neutral facilitator, whose role is to guide the dialogue, propose options that can serve as the basis for agreement, and help participants gather the technical information they need to review the practicality and desirability of each option.

### 2.1.3 Alternative Dispute Resolution

Alternative Dispute Resolution (ADR), now well established in the American legal system, encompasses a broad range of techniques for settling disputes while avoiding costly, time-consuming litigation. ADR offers alternatives to the adjudicatory process. In contrast to litigation, and even arbitration (which is considered a form of ADR), most ADR efforts are designed to bring about settlement quickly and cost-effectively, preserving rather than terminating relationships.



ADR can help Corps staff resolve disputes when standard negotiations have failed to produce satisfactory results. Structured negotiations, and more elaborate and formal processes such as mini-trials, non-binding arbitration, and dispute review boards are all available. Most ADR involves the use of a professional neutral who may play a passive, facilitating role or a highly active and directive role. Regardless of the role the neutral plays, these processes share the goal of bringing parties face-to-face to explore the factual elements of their situation, to enhance understanding of the interests that underlie each participant's stated positions, and to identify possible joint gains that could serve as the basis of a negotiated settlement. The many forms of ADR offer a way to tackle a range of difficulties from anger and disrupted communication to unrealistic appraisal of likely outcomes.

## **2.2 How do These Three Sets of Techniques Relate to Each Other?**

Partnering, consensus building, and alternative dispute resolution are distinct techniques. However, they are closely related, and are often used in conjunction with each other. To see how these techniques relate in practice, consider a hypothetical large-scale construction project. To launch the project, the Corps partners with its contractors. In addition, the Corps and its contractor use various consensus building techniques to keep themselves informed about reactions to the project, and to identify and address community concerns. While partnering should help to resolve most construction-related conflicts at the field level, claims do arise that require higher level attention. With the help of district managers and district counsel, the field staff use an ADR process to settle remaining differences. Thus, all three techniques can come into play during the life of a project.

At times, partnering and consensus building may be difficult to distinguish from one another. For example, when the Corps partners with its contractor and a local sponsor, a partnering session may begin to resemble a larger-scale consensus building effort. The techniques of consensus building and ADR may also begin to blur: the Corps may convene stakeholder groups in a consensus building effort to encourage them to resolve their differences after they have initiated a formal claim or filed a complaint in court. While we aim in this report to keep partnering, consensus building, and ADR separate, it is important to keep in mind their interrelationships.

## **2.3 Scope**

This study examines current uses of partnering, consensus building, and ADR techniques throughout the Corps. In addition, it identifies opportunities for their expanded use.





This study represents the Corps' first attempt to analyze partnering, consensus building and ADR simultaneously, and to explore how they interrelate. It does not provide a comprehensive inventory of all the dispute-related activities in every geographic district and functional division of the Corps.

We hope the report serves to focus new attention on this subject matter. Our aim is to catalyze a broader agency dialogue on conflict management both within headquarters through the Chief of Engineers Vision Implementation Group on Partnering and in districts and field offices where the bulk of the Corps' work gets done.

## **2.4 Methodology**

This report was commissioned by the Institute for Water Resources in conjunction with the Chief Counsel of the Corps. The sponsors pinpointed potential areas within the Corps where partnering, consensus building, and ADR have been or might be used. They also identified staff at Corps Headquarters who could provide information about specific uses of these techniques, as well as access to past research. We developed an interview protocol, and then conducted twenty-five one-hour, in-person interviews with each of the individuals identified by the sponsor (see *Appendix A* for sample interview questions).

Upon completion of the first round of interviews, we sought further details about specific uses of partnering, consensus building and alternative dispute resolution in fifty telephone interviews with district staff recommended to us by those we interviewed at Headquarters. (see *Appendix B* for sample interview questions). These staff included Chiefs of Construction, District Counsels, Chiefs of the Regulatory Branch, Project Managers, and others. Finally, we conducted ten in-person interviews with high ranking officials in the Corps' major directorates, divisions, and branches. To encourage informal, open and honest discussion, we prefaced our interviews by stating that no comments would be attributed to particular individuals. Therefore, the names of the individuals interviewed have not been included in the text.

## **2.5 Organization of the Report**

This report is divided into three major sections: Partnering, Consensus Building and Alternative Dispute Resolution. Each section is divided into subsections that include an overview, a description of past and current uses along with brief case studies, an analysis of our findings, an identification of opportunities for expanded use of the techniques, and recommended next steps for exploiting these opportunities as well as maintaining and supporting current uses. Numerous examples related by district staff are provided throughout the text. As much as possible, we have tried to portray the



diverse uses of the these techniques across both geographic and functional divisions. Our report concludes with several appendices, including the questions posed to headquarters and district staff, a sample consumer guide to neutral services issues by the Ohio Commission on Dispute Resolution, and a bibliography that includes sources: listed in the text; that report on the uses of the three techniques in other federal agencies; and, that detail the use of these three techniques in resolving disputes similar to those faced by the U.S. Army Corps of Engineers.



## **3 - PARTNERING**

### **3.1 An Overview**

The following overview provides an explanation of partnering, as well as a brief history of the use of partnering in the U.S. Army Corps of Engineers.

#### **3.1.1 What is Partnering?**

Partnering, as practiced by the Corps, is a purposeful effort to structure a collaborative, problem-solving relationship with a contractor during construction. Partnering is designed to reduce the often adversarial interactions that have characterized the Corps' relationships with its contractors in the past. Corps and contractor management teams worked largely independently from one another. Because they had few opportunities to get to know one another, both assumed that their interests were opposed. With little familiarity and under the pressure of a tight schedule, Corps and contractor staff often struggled with issues of substance and personality. Communication typically occurred only after problems in the execution of the contract had already developed. Without an understanding of shared goals, personal relationships, or an agreed upon process for handling disputes, small problems often generated mistrust and recrimination. It was in this atmosphere that legal claims against the Corps climbed steadily, and resources spent on litigation and formal administrative appeals skyrocketed.

Through a team-building approach to project management, partnering aims to create a climate of cooperation. The vehicle for affecting this change is a series of planned meetings which bring together key project management staff from both organizations at regular intervals during the execution of a contract. These meetings provide an opportunity for staff to become better acquainted, to communicate on a regular basis, and to work through problems before they escalate. Before work begins, there is often an initial partnering workshop designed to lay the foundation for the partnered relationship. Once work has commenced, partnering involves regular meetings of key project staff to assess progress towards mutually agreed upon objectives and to engage in joint problem-solving as needed.

Usually lasting from one to four days, initial partnering workshops are the cornerstone of partnering. These sessions usually involve no more than 30 to 40 people, including both senior management and field staff from the Corps and the contractor. The goal of these sessions is to create a forum in which all participating parties can: 1) articulate shared project goals and objectives; 2) discuss and clarify



their respective roles and responsibilities; and 3) devise mechanisms for managing disagreements before they hamper progress towards completion of the contract. When these sessions are effective, project staff leave with the feeling that they know each other on a personal basis and have begun to develop mutual trust.

A professional neutral is often, though not always, brought in by the parties to facilitate these discussions. The role of a facilitator is to guide the parties' interactions and to assist in the process of making decisions, not to advise on or make specific decisions. Facilitators may be drawn from colleges and universities or the private sector. They are typically experienced in negotiation, team building, and group dynamics. Some facilitators may also have special expertise in designing partnering sessions for construction contracts. Many districts prefer to use facilitators from their region. Regional variations in speech and manner can build or discourage trust, depending on the participants' preferences.

At the end of the workshop, agreements reached during the discussions are included in a **partnering charter**. As much as possible, headquarters has encouraged staff to identify measurable objectives in these charters such as limited cost-growth, minimum lost time due to job-related injuries, or a written commitment to use ADR if and when serious disputes do arise. At the end of the initial session, participants often arrange for follow-up meetings to evaluate progress toward reaching their stated objectives, to collaboratively solve problems that arise during day-to-day project operations, or to settle serious disputes if and when they arise.

Some staff in the Corps use the term "partnering" even more broadly, to connote any effort to enhance communication and coordination between people or organizations. For example, the term

While the agenda of each partnering workshop is different depending on the goals of senior managers and the style of the facilitator, there are common themes. The workshop usually entails numerous formal and informal exercises to build relationships, develop team work, and focus the participants on shared goals. Participants may use Myers-Briggs tests to help identify personal characteristics and styles. Interactive exercises on leadership, group dynamics, collaborative problem-solving, and mutual gains negotiation may be used to emphasize or teach effective behavior. The participants may also take some time to develop a process for dealing with unexpected problems, a project evaluation methodology for measuring progress towards stated objectives, or even a team name and logo.



**Sample Partnering Agreement**  
of the J-6 Rocket Team  
For the Large Rocket Test Facility  
Arnold AFB, TN

We, the J-6 Team, are committed to a positive utilization of PARTNERING in the construction and contract administration of this project. We believe that through PARTNERING we will be able to provide a safe, quality, functional project completed on time and within budget.

We are committed to open communications, joint problem solving, and teamwork to accomplish the following goals:

- A satisfied customer with a quality facility which works.
- A safe project with zero lost-time accidents.
- Successful project completion which includes:
  - Contract cost growth limited to 2%
  - Award 100% of the Award Fee
  - Completion within respective budgets
  - Maximizing value engineering
  - Completion on or ahead of schedule
- Total team approach resulting in Outstanding Project Team Performance.

Our goals will be achieved through a commitment to teamwork and partnering characterized by mutual trust, responsiveness, flexibility and open communication. To accomplish these goals, we, the J-6 Team, commit to project decision-making at the lowest possible level within the Team at the project site.

"partnering" has sometimes been used to describe relationship-building efforts as diverse as informal meetings of Corps staff from different functional divisions, or informal negotiations among all the parties involved in an environmental clean-up. For the purposes of this report, however, we will use the term partnering to describe the structured interactions depicted above.

While informal communications help to build relationships, the off-site workshop and follow-up meetings give partnering its punch. Partnering refers to very specific and easily identifiable efforts



to bring contracting parties together at the outset and during their contractual relationship. We extend the term to include structured relationship-building efforts between the Corps and other national or regional institutions *whose members* enter into contractual relationships with the Corps. Examples include partnering sessions between the Corps and professional associations of contractors, or architecture and engineering firms.

### **3.1.2 The History of Partnering in the Corps**

Given its success, partnering, as now understood in the construction industry, has a surprisingly short history in the Corps. The process was created in the early 1980's by private construction firms searching for ways to reduce legal claims and litigation, improve safety, and ensure timely completion of projects. In 1988, the results of partnering in the private sector convinced the Corps' Construction Policy Division of Military Programs to begin encouraging Corps senior managers to experiment with partnering in military and civil construction projects. Within just few years, its use became widespread throughout Corps districts on large, multi-million dollar projects. In several cases, districts also tried applying the concepts of partnering to smaller, less expensive projects.

In 1992, the Chief of Engineers issued a policy letter directing Corps personnel to use partnering on all construction contracts and in all other business relationships. Following this broad directive, Corps staff began extending partnering to other kinds of agency relationships. For example, the Corps now partners with regional and national associations representing the various construction, design, and engineering firms that the agency works with on a repeated basis. The Corps has also initiated partnering with other federal agencies that have overlapping jurisdictions and responsibilities.

## **3.2 Past and Current Uses of Partnering in the U.S. Army Corps**

Partnering has been used on literally hundreds of construction contracts, ranging from major construction projects in Military Programs and Civil Works valued at hundreds of million dollars to relatively small projects valued at only a few million dollars. The following sections describe some of different ways in which partnering has been applied in the Corps.

### **3.2.1 Partnering in Construction Contracts**

Partnering has been used extensively in construction contracts in the Directorates of Civil Works and Military Programs. Partnering has been used in contracts for repairing fish ladders or replacing roofs. It has also been used in complex, multi-year contracts for constructing locks and dams,



restoring contaminated military and civilian sites, and building entire military bases. Partnering is almost always used on larger projects valued at more than \$10 million, and sometimes on smaller projects valued at between one-half to two million dollars.

#### Matewan Local Flood Protection Project

The Huntington District partnered a \$27 million, four year construction contract for a flood protection project located within the city limits of Matewan, West Virginia, population 800. In addition to constructing a flood wall, the Corps had to relocate the town fire house and city hall, as well as the homes of numerous town residents. Two months after the contractor had mobilized, the Huntington District organized a partnering workshop with the contractor. The Norfolk District provided assistance in facilitating the session. Participants from the Corps not only included the resident engineer, Chief of Construction, and the District Engineer, but staff from the Engineering, the safety office, Quality Assurance, and Project Management. The first day was spent on "soft skills" such as building trust, improving communication, and identifying common goals. At the end of the second day, the partners tested out their new partnership by tackling concrete technical problems that had already arisen during the two months of project work.

Follow-up sessions facilitated by the contractor's in-house facilitator have occurred on a quarterly to semi-annual basis. These sessions have been used to resolve outstanding issues as well as set tentative deadlines for field staff to resolve other concerns. For example, the on-going construction was "swallowing up" parking for the town. By bringing the mayor and members of the city council into the partnering session, the contractor was able to help provide in-kind parking. In another instance, the Corps was able to obtain more information from the railroad on the scheduling of special rail traffic that could not be disturbed.

This complex project has not been without changes, but partnering has substantially improved the parties ability to address them. First, partnering has helped the construction team to take responsibility for resolving issues quicker, rather than just saying "That's not in the contract." or "It's their problem, not mine." Second, partnering has helped build a synergy among the parties, so that problems are solved with the coordinated expertise of many, rather than just a few. This has been critical in the Matewan project, because the relocation of major buildings and the heavy traffic caused by construction made joint problem solving by the Corps and the contractor a necessity.

Finally, the fact that solutions are developed jointly by those involved in the day to day operations of the project helps to promote the legitimacy of those decisions, and enhance staff morale.





### 3.2.2 Partnering with the Corps' Customers

In recent years, the Corps has begun to include the "customer" in partnering sessions with its contractors. The initial partnering session has served as a forum where customers can articulate their views in a discussion about project goals, learn about the division of responsibilities between the Corps and its contractor, and gain a better understanding of the tasks that must be completed. Most importantly, the customer can help project staff to anticipate the potential obstacles to project completion, and can suggest ways of coordinating work so that these obstacles are minimized.

#### Army War College's Center for Strategic Development

The Baltimore District partnered with its contractor, the Army War College, and the Army's Information Management Agency on the \$27 million Center for Strategic Development in Carlisle, Pennsylvania. The contractor had previously partnered on other projects, and thought that it would help improve scheduling of materials and work, and integration of the four separate parties during construction. The parties met with the help of a facilitator in a two-and-one-half day initial session prior to the start of construction. During construction, the players met monthly to assess the effectiveness of their partnering efforts. Later, as complex issues arose, the players held additional partnering sessions with the facilitator. Partnering helped the project team to coordinate installation of another \$12 million worth of state-of-the-art communications systems during the on-going construction process.

### 3.2.3 Partnering with Professional Associations

Buoyed by the success of partnering in military and civil contracts, the Corps has turned to partnering to improve relationships with organizations and associations representing not one, but multiple contractors or customers. For example, Corps headquarters has partnered with such organizations as the American Consulting Engineers Council, the National Association of Flood Water Management Agencies, and the International Association of Foundation Drilling. While this kind of partnering is usually initiated by headquarters, some Corps districts and divisions have also sought to establish partnered relationships with regional or state-wide organizations representing contractors or customers. This form of partnering differs from the examples of partnering described above because it does not occur in the context of a legally-binding contract. However, each of these organizations has member institutions which contract with the Corps on a regular basis. For example, the Association of Flood Water Management Agencies has as its members the many regional water districts which often serve as the local sponsors on flood control projects.

Representatives from the Corps and a national professional association meet at a formal partnering session. A facilitator is often brought in to assist in managing the conversation. Together, the





representatives discuss how to lay the foundation for better working relationships between the Corps and the association's members during future projects. They might jointly develop standards and guidelines for design or construction work; discuss ways of fostering safe construction practices; or identify the circumstances which tend to produce intractable disagreements during contract performance, and discuss ways of preventing such disagreements from developing. These partnering sessions facilitate better communication and coordination between the agency's field staff and the associations' geographically-dispersed member organizations. Moreover, it establishes a visible model for collaborative decision-making that can be transferred to contract management.

#### **American Association of Port Authorities**

Since the inception of local cost sharing in 1986, port authorities wanted a more active role in Corps coastal projects, from project design and management to financing. Together with the American Association of Port Authorities (AAPA), the Corps organized a series of seven regional partnering sessions across the United States and the Pacific Trust Islands to help spark dialogue about changes that needed to be made in the way that the Corps and Port Authorities work together. As many as 100 attendees participated in each of the regional partnering sessions. When all the regional partnering sessions were complete, a national partnering session was held with staff from Headquarters, the AAPA, select district and division staff, and port representatives.

A professional facilitator helped the Corps to develop a one-and-one-half day format for the regional sessions. On the morning of the first day, a panel of local port and Corps staff joined in a facilitated discussion on planning and design, operations and maintenance, and permitting and regulation. In the afternoon, the participants broke down into their individual districts to identify major areas of concern. Then, after sharing these concerns with the whole group, the districts convened again to discuss strategies for addressing their concerns. The regional sessions generated district/port partnering agreements, more regular Corps-port meetings, and later workshops on such subjects as dredge material management planning.

The national meeting between Headquarters, AAPA and some of the participants from regional sessions also produced valuable results. At the end of the meeting, participants agreed on a set of action items, including: drafting a model "Project Cooperation Agreement" for ports; establishing regional and national "issue resolution groups" with representatives from the ports, the Corps, EPA, Fish and Wildlife, the National Marine Fisheries Services, and relevant state agencies; and, developing a national dredging policy.

Both the regional partnering sessions and the one-time national session helped to improve much needed communications between local customers and the Corps, as well as to establish concrete



goals for both parties to work toward throughout the year. They also demonstrated to Corps and port authority staff from around the country how they could use partnering to their advantage.

#### 3.2.4 Partnering with Other Government Agencies

The Corps has entered into memoranda of understanding with numerous other federal agencies in an effort to clarify roles and responsibilities, and to formulate guidelines for working together. Still, the need for close and continuous coordination between the Corps and some of these agencies has led senior headquarters staff to use partnering as a means of further improving long-standing agency relationships. For example, the Corps works closely with the Environmental Protection Agency (EPA) in diverse venues, including wetlands regulation and permitting, clean-up and remediation of Superfund or Formerly Used Defense Sites, and dredging projects in coastal waters. The Corps also works side by side with the Air Force in military construction projects, such as in construction or renovation of military air bases. These are just two among many examples, but they suggest how closely intertwined the work of the Corps is with that of other agencies. The Corps has sought to partner some of these agency relationships, in order to address the factors which have generated historic animosities and to identify ways of improving communication and coordination. In addition to these national partnering efforts, the Corps has invited state and federal regulators to participate in project-based partnering when they have major regulatory authority over a particular project, such as in the clean-up of toxic waste sites.

##### Office of Civil Engineer, U.S. Air Force

The Directorate of Military Programs partnered with the Office of the Civil Engineer of the U.S. Air Force, one of the Corps most demanding customers. The Corps' Director and Deputy Director of Military Programs as well as a District Commander and Chief of Engineering participated in the one-day event. The partnering session allowed representatives of the two institutions to discuss issues that have generated or may generate conflict in the Corps' ongoing work with the Air Force. The Air Force stressed to the Corps the importance of their resident engineer in day-to-day work.

In addition, the Air Force emphasized that as the customer, the Corps should be highly responsive to their needs. The Air Force stated: "We're happy customers but still not satisfied customers." In turn, the Air Force assured Corps personnel that they intended to keep the Corps as their major provider of construction services. The parties ended the session by drafting a Partnering Agreement emphasizing a "mutual vision of excellent facilities and engineer support to Air Force commanders."

Partnering on specific contracts may also include numerous stakeholders aside from the contractor and the Corps. When this occurs, and the parties and issues multiply, partnering can begin to



resemble consensus building. This kind of hybrid process, detailed below, can significantly improve coordination of project tasks, bring to the contractor's attention the concerns of customers and other federal agencies, and help to resolve disagreements that otherwise might seriously disrupt or even halt construction.

### Laguana Madre Dredging Project

The Galveston District partnered on a \$3 million dredging of the inter-coastal waterway between Brownsville and Corpus Christi, Texas. The Corps and its contractor partnered with numerous ports, waterway users, and other state and federal agencies. The Laguana Madre is one of only four hypersaline lagoons in the world. Agencies such as Fish and Wildlife, the National Marine Fisheries Service, and Texas Parks and Wildlife were concerned that dredging would disturb the endangered species, sea grass, and productive fishing grounds of this unique ecosystem.

Over thirty representatives met with two facilitators in a two-day partnering session. The Corps announced that they had employed an area university to monitor such impacts as increased turbidity and sea grass destruction and regrowth caused by dredging and filling. The facilitators helped the parties identify many of their underlying concerns.

Most importantly, the partnering not only helped to bring the contractor on board, it also allowed the other stakeholders invested in the project to resolve their differences: differences that would have made the contractor's job all the more difficult. For instance, the agencies and ports disagreed over the need for dredging work. The facilitators separated the agencies and ports into a sub-group to help them discuss their differences. As one Corps staff member said: "There was a lack of trust so that all the joint solutions sitting on the table were hard to recognize." After two days of face-to-face discussion, the parties developed a much better understanding of each other's interests and concerns. The parties established a process for ensuring an ongoing presentation of their concerns to the contractor. The Corps and contractor agreed to prepare a weekly report to keep all stakeholders informed about the work.

Although a suit was later brought against the Corps by disgruntled environmental groups, the case was dropped because opponents could not marshal enough scientific evidence to challenge the Corps' actions. "The best defense," according to one Corps staff, "was building a strong case long before litigation. We developed an innovative plan, obtained outside monitoring, and coordinated with the ports and the agencies to get community and government buy-in." Because of the success of this partnering, a similar process has been used on two other dredging projects.



### **3.3 Analysis**

3.3.1 Partnering has helped to improve working relationships, reduce claims, and ensure that projects are completed on-time and within budget.

Almost universally, Corps personnel describe partnering as a success. Personnel at the district and headquarters level cite improved relationships between the Corps and its contractors, reduced numbers of claims at the end of projects, and on-time and within budget project completion.

◦ **Improved Relationships:** Partnering has helped improve working relationships. How has it accomplished this? First, the process of identifying shared goals has helped both the Corps and the contractor to gain a better understanding of each other's underlying interests and priorities. Historically, project management teams tended to assume that their respective interests were in conflict, and that only an aggressive posture would ensure the victory of one set of interests over another. However, after initial partnering sessions that emphasize a discussion about shared goals and objectives, both Corps and contractor have left many of their former misconceptions behind. For instance, partnering has helped demonstrate to contractors that the Corps is interested in fair profits for private industry. If a contractor is making money, staff and management are more likely to be easy to work with, and to refrain from wasteful "nickel and dime" changes. At the same time, partnering has helped the Corps see that private industry is interested in quality workmanship. Many partnering agreements include, as one of their stated goals the importance of quality product delivery. Through identifying shared goals and interests, Corps and contractor staff begin to see one another more as partners and less as adversaries.

Second, by encouraging both staffs to explore their relationships before the substantive work of construction begins, partnering has also helped bring out unspoken and hidden concerns. With the help of a neutral facilitator, the parties are often able to talk about unspoken fears that would not come out without the non-threatening, "time-out" of a facilitated partnering session. As one Chief of Real Estate stated: "Deep-rooted and latent opinions and feelings are sometimes extracted in the course of a partnering session that may have never been stated."

Third, partnering has helped the parties develop personal relationships with one another. Through informal conversations during partnering sessions, sharing the results of such "tests" as the Myers-Briggs personality test, or simply playing a game of softball, partnering encourages the Corps and its Contractor to get to know one another personally and individually. As a result, parties tend to be more responsive to one another in a work setting. Furthermore, by including Chiefs of Construction as well as resident engineers and other field staff, Corps personnel get to know each other better as well. This face-to-face contact encourages team building not only between but within organizations.



◦ **Reductions in Claims:** One of the major advantages of partnering is the significant reduction in claims filed by contractors in partnered relationships. One senior official stated that he had seen "no major claims for a long time due to partnering." Another said: "A large number of construction projects are now completed without any lawsuits whatsoever. Many of these are complex projects that would ordinarily result in multiple claims leading to litigation." One District Counsel offered statistics: in 1985, he personally had 200 claims pending, with a value in excess of \$200 million. At the time of the interview, the number of claims that he was responsible for had dwindled to eight, and their value totaled only \$50,000. This accords with statistics kept by the Chief Counsel's Office, which estimate that claims fell from a high of around 1,200 annually during the mid-80's to around 300 today. Appeals fell from almost 800 in 1987 to some 300 by the mid-90's.

Before partnering, claims would often languish for years before they became formal appeals in litigation. After partnering was introduced, Corps and contractor staff have been build professional relationships, improved communication and identified common objectives. This allowed Corps staff to resolve many disputes with contractors before they became formal claims. Field staff in particular have been allowed and encouraged to take responsibility for resolving problems earlier, before their positions have hardened and they are determined not to "lose face." Because senior managers often participate in initial partnering sessions and signal their commitment to solving problems with the contractors through cooperation, field staff are less likely to elevate disputes to higher levels. As one Chief of Construction said: "Once people are partnering, they know if they don't resolve issues, their higher-ups are likely to. This changes behavior at the lowest levels." If a dispute does happen to be elevated later, the shared goals spelled out in the partnering agreement establish a context for negotiation.

While partnering has helped significantly decrease the number of outstanding contract disputes, other factors have also contributed to the overall reduction in claims and appeals. The reduction in claims has also been achieved, at least in part, through the completion of some contentious international projects. Significant claims outstanding from projects overseas inflated the number of overall claims in the Corps during the 1980s. As these one-of-a-kind project claims were settled, the total number of claims annually would likely have fallen regardless of other factors. In other domestic projects, the use of ADR has helped to reduce the total number of claims. For example, while the Fort Drum Disputes Review Board was only one ADR process, it led to the settlement of over 100 claims totaling \$41.7 million. While partnering has certainly had a remarkable impact on claims reduction, it should not be viewed as the sole explanation for such decreases. Partnering and ADR have worked together to reduce claims and appeals.

It is difficult to conclusively document the impact partnering has had on the total number of claims because of the limited reporting requirements imposed on partnered projects. Upon the inception



of the program, Corps senior management agreed not to burden the districts with extensive reporting requirements (see section 3.3.3). While anecdotal reports abound, the measurable success of partnering has not been tracked. Thus, the Corps does not have the extensive data needed to evaluate partnering systematically. Compiling actual statistics on the success of partnering would validate the overwhelming enthusiasm of Corps staff for partnering's success. It would also facilitate the efforts of senior staff to evaluate and improve the program in the long term.

- **Projects Completed On-Schedule and Within Budget:** Corps staff, as well as studies by such bodies as the Construction Industry Institute (CII), suggest that partnering's focus on quality work, increased face to face discussions, and better coordination saves time and money. A 1994 CII survey of private and public construction organizations found that respondents estimated their cost savings at 7% to 26%, with an average reported cost savings of 7% (see Team Building and Project Partnering, 1994 CII Conference). Corps staff indicate that individual projects with complex coordination problems and difficult political circumstances are more likely to finish on-time due to partnering. Corps staff overwhelmingly support partnering's success.

### **3.3.2 Partnering is well on its way to becoming an integral part of the Corps' business practices.**

Partnering in construction contracts appears to be widely accepted throughout the Corps. One high ranking Corps official said: "Partnering is embedded in the spirit of the Corps. It is really entering the culture of the agency." The Corps estimates that hundreds of projects have been partnered. In 1992, the Chief of Engineers issued Policy Statement #16 requesting that all construction projects be partnered and that partnering also be used in all Corps business relationships. Three districts participated in partnering in 1988, by the middle of 1993, 35 districts were partnering. The Mobile District has utilized partnering on thirty-five contracts totaling over \$1 billion in the last four years.

However, some Corps personnel argue that there may be, at times, some sacrifice of quality for quantity. While formalized partnering, with an outside facilitator, a two day initial workshop, a partnering charter, and frequent follow-up sessions, is being used on many if not most large projects, such comprehensive partnering may not take place on all projects, particularly smaller ones. Some Corps staff seek cost savings through utilizing a Corps staff person instead of a professional facilitator. One-half to one-day rather than two-day workshops also keep costs to a minimum. However, some Corps staff stated that truly effective partnering requires an outside facilitator who is clearly beholden to both the Corps and the contractor. Other staff emphasized that when initial workshops are shorter than two days, they do not give participants the necessary time to cement stronger personal relationships. While utilizing inside facilitators and reducing the duration of initial workshops may reduce costs, cost saving measures may prevent Corps staff from realizing the full benefits that more comprehensive partnering can bring (see *Section 3.3.6* for further discussion).



3.3.3 Partnering has been widely used because of its cost effectiveness, because there has been minimal high-level interference, and because it is compatible with existing "best practices."

Corps staff cited several reasons why partnering has been adopted widely throughout the Corps.

- **Cost Effectiveness:** Corps staff see partnering as cost effective: the initial investment in partnering, in staff time and the professional fee paid to the facilitator, is seen as minimal compared to the cost of a multi-million dollar project gone awry. The Mobile District has estimated that a facilitator hired for an initial four day workshop, including preparation time, costs between \$6,000 and \$10,000. Staff time, conference facilities, and travel must also be covered. In turn, however, partnering can help save millions. For example, in the \$110 million Oliver Replacement Lock and Dam project on the Black Warrior-Tombigee Waterway, partnering helped reduce the projected shutdown of the waterway from 21 days to only 13 days, saving an estimated \$1 million per day in lost shipping.

It is important to note that while the cost of partnering is relatively low when compared to the value of large contracts, this difference can vanish in smaller projects. Some Corps staff cited the expense of staff time and the cost of a paid facilitator as barriers to the use of partnering in small contracts. More generally, as one Chief of Construction pointed out, broad use of partnering within a district may strain the resources of top level management. "When an office has 200 active contracts valued at \$500 million, there is a tremendous time investment by senior staff in partnering, from initial to follow-up sessions."

- **Minimal High-Level Interference:** Headquarters has allowed partnering to flourish at the district level with minimum interference. As one high level official stated: "One of the major reasons why partnering has been so successful is that we have opted to stay out of the way." Though mandated by a policy statement by the Chief Engineer, headquarters does not impose rigid standards of use, heavy reporting requirements, or extensive data collection. One headquarters staff member said: "We were entrusted not to make partnering too painful for the field. We didn't collect data or statistics. It wasn't another report card to fill out." As a result, districts have been far more willing to use partnering. Headquarters, districts, and the field all feel ownership of the program. Of course, as discussed above, while minimal requirements have helped partnering flourish in the Corps' decentralized organization, they have also made it difficult to chart partnering's success.
- **Compatibility with best practices:** Partnering did not initiate an entire new way of doing business. Some exemplary district commanders and resident engineers were already informally using the collaborative, goal-oriented, team approach that has been formalized through partnering. One Chief of Construction said: "If you look back through difficult but successful





projects, you see that the partnering concept, if not formally in place yet, was already in action." Partnering **recognized** and elaborated upon a highly effective way of working with contractors.

3.3.4 Partnering has raised concerns about the Corps' traditional arms-length relationship with contractors.

Partnering, some fear, may create too much "coziness" between the Corps and its contractors. Two fears have arisen: (1) the Corps' oversight and enforcement of contracts will decrease, diminishing the agency's mandated accountability to the public; and, (2) partnering activities transgress government rules against accepting gifts.

Some Corps staff have expressed worry that partnering may simply encourage more "giving in" to the contractor, rather than a mutual and fair resolution of differences. While some cite conflict resolution at the lowest levels of the Corps as a benefit, some fear that field staff are not elevating enough claims to higher authorities. Instead, they are settling them too early through the partnered relationship, even though the claims may be either overstated or even frivolous. Interestingly, while district level staff fear that partnering, in some cases, gives less experienced staff at a lower level more decision-making power than they can exercise effectively, field staff fear that partnering may allow higher level management to unwisely negotiate claims, when instead, they should pursue litigation. One former field staff member described his perspective in the following way while discussing a partnered environmental restoration project: "The Corps was hamstrung by bureaucracy and the higher ups overruled field staff. Through partnering, the management negotiated a new incineration rate when they never should have." It is important to note, however, that while some Corps staff believe that the Corps has become too "cozy" with contractors and consequently "given up the store" during negotiations, other staff point out that the strict rules and regulations of particular contracts and overall government contract law clearly circumscribe and contain the partnered relationship within acceptable bounds.

Second, we also heard concerns that partnering activities may transgress government prohibitions against accepting gratuities. While agency-wide rules and regulations on the acceptance of gratuities in partnered relationships do exist, many Corps staff affirmed that there is misunderstanding about them. When participants engage in such team building activities as weekend softball and want to distribute t-shirts with a team logos or other equipment, uneasiness can arise. Staff are uncertain whether they can accept such gifts from contractors, and Corps managers are confused about whether they can pay for such effects with government dollars. These questions over minor expenditures, while seemingly insignificant in comparison to multi-million dollar contracts, can subtly erode morale and team work.





3.3.5 High expectations for partnering's success can place undue pressure on field staff to settle disputes.

As noted in *Section 3.3.1*, numerous assertions have been made about partnering's success in reducing claims. Unfortunately, the expectation that partnering limits, or all together eliminates, contract claims, inadvertently places enormous pressure on field staff. If unresolved claims ending in ADR or litigation suggest that a partnership has failed, field staff will clearly work very hard to settle potential claims to avoid "failure." As one top official at headquarters stated: "This is a problem that Corps leadership has created. It's our fault and I feel sorry for the Corps staff who are associated with the first partnered relationship to end up in court. They will go down in history." From our interviews, it seems, while enthusiasm for partnering is on the rise, expectations about partnering's success may be too high.

While partnering has been highly successful, it is not a way to avoid all conflict. One Chief of Construction stated: "Partnering doesn't prevent all disputes, but it may establish a path for resolving them." One senior district official said: "Just because there are claims does not mean that the partnership has failed. Part of partnering is usually to decide to settle disagreement at the lowest possible level. But, when things get to a certain point, it is important to establish procedure to settle claims that arise." While partnering may first encourage Corps field staff to settle disagreements, it can also legitimize alternative procedures to process claims when they do arise. For example, a partnered relationship on a contract in the Mobile District allowed the partners to more readily hire a mediator and resolve a multi-million dollar claim without litigation. Unfortunately, this important link between partnering and ADR is often missed. While some partnering charters include references to ADR should the need develop, others have not addressed the matter. One Headquarters staff explained: "Many people are not willing to set the stage for later conflict in a period of optimism when partnering begins. Couples typically don't discuss marriage counseling during the honeymoon." ADR ought to be presented and explained by the highest officials of the Corps as a supplement to partnering, and not as a sign of its failure.

3.3.6 Partnering can lose its "punch" when applied too broadly to areas far from its origins in construction contracts.

With the enthusiasm for partnering high, advocates have applied it to a host of challenges ranging from improving relationships among internal Corps offices to resolving disputes in Superfund cases. It is certainly useful to approach these kind of relationships in a collaborative way. However, the tendency to think of all relationship- building and collaborative problem solving as nothing more than an extension of partnering obscures the intent of the original idea. For example, improving relationships between staff from different offices is very important. Yet, it occurs in a context without a formal contract and with a long past history of expectations, conflicts, and personalities.



Because of these differences, simply applying partnering as it is understood in construction contracts will likely fail. Failures where partnering is misapplied are likely to cast a shadow over the entire program.

Furthermore, because partnering has been so widely embraced, individual Corps staff feel compelled to partner projects without fully understanding what partnering is, what it can do, and how to do it. In some cases, staff go through the motions of partnering by holding a two day initial workshop and developing a charter, but do not use the time to build relationships, establish realistic and worthwhile goals, or lay the foundations for a strong working alliance. As one headquarters staff member said: "Some are faking it by signing charters, but it's only a formality."

Enthusiasm for partnering can turn to disenchantment when the original intent and content of the program is lost. Partnering cannot be all things to all people. The Corps should be circumspect about stretching the use of the term and applying it too broadly.

### **3.4 Opportunities**

We have identified the following opportunities for the expanded use of partnering in the Corps. Following the identification of these opportunities, we detail several next steps necessary to achieve them.

- **Partnering could help improve the relationships between the Corps and other federal and state agencies with relevant regulatory jurisdictions.**

By partnering with high-level managers in other federal agencies, as well as including other federal and state agencies in the partnering of specific projects, the Corps has helped to build common expectations and goals for the ways in which different agencies can and will relate to each other. These efforts need to be expanded across the Corps into all districts at the project level, and to take place at the highest levels of management with important counterparts such as the EPA and Fish and Wildlife.

- **Partnering can be used more broadly in relationships between the Corps and its contractors on smaller contracts ranging under \$1 million.**

While partnering has been used on most large scale projects, its use on smaller projects is more sporadic. When partnering is used on these projects, an abbreviated form with fewer days and little or no professional facilitation is often employed (see *Section 3.3.3* for discussion of the increased costs of partnering relative to benefits on smaller projects.) Because partnering has



been so successful on larger projects, its use on smaller projects ought to be encouraged. However, forms of partnering that are cost-effective yet still capture the necessary elements of a successful partnering effort need to be explored.

- **Partnering can help improve relationships between the Corps and its local sponsors.**

Some Corps district staff are involving local project sponsors in partnering with contractors. These efforts have paid off. The initial partnering session has served as a forum where sponsors can articulate their concerns, enhance their understanding of the division of responsibilities between the Corps and its contractor, and keep informed about project activities. In addition, through their participation in partnering sessions, local sponsors have helped project staff anticipate the potential logistical problems that lie ahead, and have made suggestions for how to coordinate work so that these problems are avoided. Where appropriate, the Corps should encourage district staff to expand their efforts to include sponsors in partnered relationships.

### **3.5 Next Steps**

At least some Corps staff have expressed fear that partnering will fade. While this fear may be largely unfounded, partnering needs continued support to remain effective in the Corps. It is critical that this support clearly distinguish partnering from other forms of relationship-building that are less structured or well-thought out. Headquarters should continue to encourage districts to partner a variety of construction contracts. At the same time, there should be a purposeful effort to encourage the careful expansion the program into new arenas such as Corps-federal agency and Corps-customer relationships. The Corps will also need to find ways to analyze, evaluate, and improve the partnering program without impinging on the autonomy and oversight of field and district staff.

We recommend the following next steps.

#### **3.5.1 Set realistic expectations for partnering's success**

The Chief of Engineers should issue a policy statement outlining the expectations of top level staff regarding partnering. This statement should aim to counter the exaggerated expectations of success that have permeated at least some parts of the agency. It should also explicitly link partnering and ADR, by making the following points

- Partnering does not and is not expected to eliminate all claims.



- When informal negotiations within the context of a partnered relationship fail to resolve disagreements, ADR offers effective, alternative means for resolving the issues in contention before litigation becomes necessary.
- In the event that partners employ ADR, it is not a signal that partnering has failed, but rather that partnering and ADR have worked well together as complementary approaches to avoiding and managing conflict.
- Every initial partnering session should seek to lay the groundwork for the use of ADR by encouraging the parties to include in their written partnering charter a commitment to trying an alternative approach if serious disagreements arise during contract execution.

#### 3.5.2 Link partnering to ADR.

Senior Corps staff should take steps to strengthen the link between partnering and ADR in both theory and practice. The proposed policy statement described above would help to clarify the complementary relationship between these two approaches to managing conflict. In addition, the following steps should be taken.

- Senior staff should encourage the inclusion of a discussion about ADR in every initial partnering session. Ideally, all partnering charters should express both the Corps' and the contractor's commitment to trying ADR if a project gives rise to a serious disagreement and negotiation efforts fail.
- A Small Contracts & Claims Task Force should consider how best to implement both programs jointly in small contracts and claims.
- Training courses on either partnering or ADR should include a discussion of the intrinsic link between the two approaches to managing conflict, and the value of using them together if and when parties reach an impasse.

#### 3.5.3 Establish a small contracts task force.

The Corps should establish a task force to design a cost-effective partnering program for small contracts. The task force should also explore ADR techniques for settling smaller claims ranging from approximately \$100,000 to \$1 million. The task force ought to include Chiefs of Construction and District Counsels who have experience overseeing smaller contracts. At least one, if not more, resident engineers should serve on the task force.



#### 3.5.4 Encourage inter-agency partnering

The Corps should continue efforts to partner with other federal agencies that have similar or overlapping authorities. Specifically, the Corps should partner with the EPA, the Department of Fish and Wildlife, and the Federal Highway Administration at the highest levels. Partnering would assist the Corps in improving its long-term relationships with each of these agencies by opening up lines of communication; creating opportunities to exchange information about their respective missions; identifying shared goals and opportunities for further collaboration; and, fostering more regular contact between senior managers at the highest levels. Resulting partnering agreements would help to establish a durable framework for working together in the future. These partnered relationships should be extended to the division and district level by encouraging Corps staff throughout the country to partner with their agency counterparts. The national and regional partnering with the American Association of Port Authorities is a particularly good model for this type of partnering.

#### 3.5.5 Provide guidance on partnering with local sponsors.

The Corps should develop written guidance on how local sponsors can and should be incorporated into the agency's partnering program. These materials should be widely disseminated across Corps district offices. They could include a description of the procedures that can be used to invite and manage sponsor participation. They could also include numerous case studies illustrating the benefits of including sponsors and laying out how different districts have opted to structure sponsor participation. At the same time, any written materials should also caution Corps staff about the possible complications of sponsor participation. For example, it should be pointed out that adding parties to a partnering session will increase the complexity of the exchange, making it even more important to have the assistance of a skilled facilitator capable of managing a multi-party dialogue. It should also caution Corps staff about the possibility that some sponsors may have unrealistic expectations about the Corps' ability to respond to all of their preferences. This points to the importance of using the initial partnering workshop to reach agreement on each parties' roles, responsibilities and authority.

#### 3.5.6 Promote communication about partnering across divisions and districts.

To maintain and improve the quality of partnering in the future, the Corps should actively promote the sharing of information and ideas about partnering among staff throughout the agency. These mechanisms should not only facilitate the vertical flow of information up and down the chain of command, they should also facilitate the flow of information laterally across Corps districts and divisions. The Corps should harness its new electronic mail system as one vehicle for facilitating the exchange of ideas and experiences among staff in different parts of the country. Within the existing e-mail network, the Corps could set up electronic "bulletin boards" where geographically



dispersed people can exchange mail, post notices, share personal accounts, and issue requests for information or advice.

#### 3.5.7 Collect and evaluate data on the use of partnering in the Corps.

The Corps ought to systematize its data collection and analysis of partnering. While headquarters should be careful to respect the autonomy of district and field staff to implement partnering according to their own needs, the collection of data would enable a more detailed analysis of partnering. Such an analysis would provide a realistic picture of the program, as well as highlight areas for improvement and refinement. Case studies of instances where partnering achieved only modest success, and a frank discussion of the problems that arose, would help staff to understand both the benefits and the limitations of partnering. Credible agency-wide research is the first step towards ensuring that expectations for partnering are realistic.

#### 3.5.8 Aid staff in selecting able facilitators.

The Corps should consider ways of disseminating information to division and district staff on how best to identify and select skilled facilitators and how to evaluate their performance. Several steps could be considered:

- Headquarters should prepare a "consumer guide." Such guides can describe for Corps staff what to expect in a mediation process and can advise parties on the most important qualifications to look for in a facilitator (see *Appendix C* for a sample guide from the Ohio Commission on Dispute Resolution).
- Each division or district could formulate a directory of facilitators in their area who have the experience and skills to effectively orchestrate partnering sessions. The directory could include detailed descriptions of both firms and individuals, and the particular services they provide. In order to avoid procurement complications, the directory would include all firms who wanted to be listed as long as they provided the basic information regarding such information as educational background, past experience, references, and services offered.
- In partnership with a construction trade association, the Corps might consider sponsoring training for facilitators who want a better understanding of the particular needs of government-sponsored construction projects.
- In order to learn from experience, the Corps ought to provide staff in the field and in districts with standard evaluation forms for neutrals. Such evaluations would



provide feedback not only on the neutral but also on the process used. Criteria for evaluation might include: improved communication; clarification of viewpoints; identification of options and alternatives; and, satisfaction with the outcome in terms of fairness, durability, and efficiency. The results of such evaluations should be kept on file with district offices and made available to interested Corps staff.

#### 3.5.9 Clarify rules about gratuities

The Corps ought to clarify the rules and regulations concerning the acceptance of gratuities. One means of accomplishing this would be to prepare a set of clear, pragmatic guidelines tailored to the everyday decisions that district and field staff must make during partnered relationships. The guidelines should be widely distributed throughout the field in the form of a small "user-friendly" pamphlet. In addition, the guidelines should be presented and explained during all initial partnering workshops.



## **4 - CONSENSUS BUILDING**

### **4.1 An Overview**

The following overview provides a detailed explanation of consensus building techniques as well as a brief history of the development of these techniques in the U.S. Army Corps of Engineers.

#### **4.1.1 What is Consensus Building?**

Whether the Corps is constructing a local flood control project, dredging a coastal waterway, permitting a new development in a wetlands area or cleaning-up a formerly used military base, a host of individuals and organizations are affected. Agency staff in district offices across the country frequently confront demands from such groups for greater input into Corps decision-making. People want their concerns to be taken into consideration. When decisions are made without consultation, conflict can erupt, often leading to lawsuits or injunctions that prevent the agency from completing projects on time and within budget.

Corps staff have used consensus building techniques as a means of preventing conflicts. Consensus building involves informal, voluntary dialogue that brings multiple "stakeholders" face-to-face. The term stakeholder refers to individuals or institutions that have identifiable concerns about the outcome of a decision or action. In the work of the Corps, stakeholders typically include: industry groups; environmental groups; local, state or federal agencies; and, members of the public who believe their homes or communities may be affected by Corps actions.

Like partnering and ADR, the term consensus building refers not to one, but to a whole range of techniques. Consensus building aims to supplement conventional governmental decision making (not to replace it) by offering stakeholders a way of voicing their ideas and concerns. Through dialogue, stakeholders work with agency representatives or public officials to ensure that decisions take account of their interests. Often consensus building centers around an ad-hoc assembly representing all the stakeholders who are concerned about a particular problem or agency decision. The meetings of such groups are typically managed by a professional facilitator who guides the dialogue, proposes options that serve as the basis for agreement, and helps participants gather the technical information they need to review the practicality and desirability of each alternative.

Many steps may be necessary to assemble a fully inclusive group capable of representing all stakeholder interests.





- A neutral usually helps to identify stakeholder groups by completing a conflict assessment. Each group is then helped to select individuals who can represent it in communication and problem-solving forums.
- Representatives meet face-to-face and formulate ground rules to guide their interactions.
- With help and guidance from a facilitator, they set an agenda specifying the issues to be covered.
- They undertake joint fact-finding to increase the availability of credible information. Joint information gathering establishes a common basis for evaluating options.
- They brainstorm multiple options that meet the interests of the stakeholder groups (i.e., they seek to maximize joint gains).
- Finally, without formal voting, the assembly recommends actions, usually in writing, that the representatives can "live with."

The methods of consensus building are closely related to those of partnering and alternative dispute resolution (ADR). Like partnering, consensus building aims to improve relationships by anticipating issues that may generate conflict and creating a forum where those issues can be discussed and solutions can be developed. Both seek to *prevent* conflict through structured dialogue. However, consensus building is typically more structured than partnering, and more focused on generating solutions to specific problems rather than on building relationships. Because of the diversity of parties and interests, it is often necessary to rely on jointly developed ground rules and assistance from a trained facilitator. In this sense, consensus building more closely resembles ADR, which uses similar strategies to help parties reach settlements more effectively after a dispute has erupted.

There are also important differences among these three sets of conflict management techniques. Unlike partnering, consensus building typically involves many stakeholders, not just a contractor and the Corps. Moreover, the participants in a consensus building process may not have any contractual relationship; their only connection may be their shared interest in the outcome of a decision. Unlike ADR, consensus building is not necessarily a last stop prior to litigation. Indeed, it is often a way of *preventing* disagreements from escalating to the point where an impasse results.

Consensus building closely relates to the Corps rich history of public involvement. Both consensus building and public involvement encompass techniques agencies can use to communicate with stakeholders. However, in our view consensus building differs from public involvement in several



important ways. First, the goal of public involvement is often to share information with the public and then invite comment. For example, agencies may distribute a document and then solicit written comments from the public, or hold a public meeting to give members of the public the opportunity to voice their concerns about a proposed project or action. In contrast, consensus building creates a forum where multiple stakeholders can participate in *shared decision-making*. Stakeholders work with agency representatives on identifying information they need to evaluate a proposed project. Moreover, participants in consensus building are at the negotiating table before decisions are made; they are actively involved in the process of assessing options and proposing workable solutions that meet the interests of all sides.

Another important difference between public involvement and consensus building concerns who participates and for how long. In consensus building, an agency identifies a group of individuals who can represent various stakeholder groups, often with the help of a professional neutral. These individuals are then invited to participate in multiple meetings over a period of months or years. In contrast, public involvement efforts are usually open to anyone who wants to participate. Rather than convening a group of people who will work together over a sustained period of time, these efforts typically engage the public on an ad hoc, meeting by meeting basis. Finally, consensus building more often relies on the services of a professional neutral who can help identify representatives of stakeholder groups, facilitate meetings, and mediate among diverse parties in both face-to-face meetings as well as in individual caucuses.

#### 4.1.2 The History of Consensus Building in the Corps

The history of consensus building in the Corps is closely linked to that of public involvement more generally. During the 1970's, with strong support from Headquarters, Corps staff gained experience in involving the public in agency actions. As consensus building techniques such as facilitated advisory committees developed during the late 1970's and 1980's, Corps staff who had experience with other public involvement strategies began to incorporate these new techniques into planning, permitting, and project management efforts.

Stuart Langton's 1994 study, *An Organizational Assessment of the U.S. Army Corps of Engineers in regard to Public Involvement Practices and Challenges*, charts the history of public involvement in the Corps. Langton notes that the enactment of the National Environmental Policy Act (NEPA) in 1969 transformed the traditional closed door approach whereby trained agency experts were given sole responsibility for making decisions on behalf of the public. In response to new public participation requirements in NEPA, the Corps of Engineers organized large-scale public meetings and entertained written comments to ensure public input into agency actions. The Corps instituted a three-tier comprehensive program of field assistance, training, and dissemination of case studies.



The Corps provided outside consultants to assist districts in expanding and improving upon public participation efforts. Training courses were offered to planning and public affairs officials as well as executives. The Institute for Water Resources developed concept reports, guidelines, case studies, and program evaluations. The Chief of Engineers issued circulars and directives. By 1979, a comprehensive study by two researchers, including a former Corps resident scholar, entitled *Can Organizations Change? Environmental Protection, Citizen Participation, and the Corps of Engineers* concluded that the Corps had done better than most other federal agencies in involving the public in agency planning.

However, while efforts to enhance public involvement reached their peak under President Carter's administration, by the early 1980's, the use of public involvement strategies declined. Many factors may have played a part. First, the Reagan administration did not support many of the public participation reforms enacted during the 1970s. Second, some Corps officials feared that public involvement programs would allow the agency to overstep its role of implementing the Chief Executive's directives, by giving staff a means to build their own political constituencies. Among Corps Headquarters staff the enthusiasm for intensive public participation gradually waned. The Institute for Water Resources, a major innovator in earlier public involvement efforts, turned its attention to assisting the Chief Counsel's Office in establishing ADR.

Nevertheless, some Corps district staff used innovative public involvement and consensus building techniques in some projects during the 1980s. Consensus building efforts were initiated by various district staff across the country as a practical means of avoiding public opposition to Corps projects, reducing inter-agency conflict, and involving local sponsors in decisions. In part, these efforts were spurred on by the growing influence of advocacy groups, the 1986 enactment of the Water Resource Development Act (requiring cost sharing by local sponsors), the creation of the Project Manager position in 1988, and the willingness of younger Corps staff to consider new ways of accomplishing the agency's mission.

While the use of consensus building is clearly an outgrowth of earlier public involvement practices, its history in the Corps differs from the history of earlier public involvement practices in an important way. Public involvement was systematically encouraged by Headquarters. Consensus building, on the other hand, has developed through the impetus of motivated field staff. With the support of their district commanders, these staff have sought out training on their own, and have used their newly acquired skills to develop new and innovative techniques.



## **4.2 Past and Current Uses of Consensus Building**

Consensus building has been used in diverse situations from building agreement for general permit conditions in the Regulatory Branch to improving coordination with local sponsors in Project Management. Consensus building techniques have ranged from multi-meeting facilitated public workshops involving hundred of participants to smaller scale community advisory committees that have provided input during construction. In the following sections, we list the major types of consensus building we have identified in the Corps.

### **4.2.1 Coordination and Problem Solving with Local Sponsors**

Project managers have employed a variety of consensus building techniques in an effort to establish better relations with local sponsors during the planning, design and construction of Civil Works projects. Local sponsors are typically municipalities, counties, states, water management districts, or other governmental organizations that agree to bear a fixed percentage of the costs of a project. Consensus building techniques are being used by project managers to help structure how district offices and local sponsors work together.

Most consensus building efforts represent a dramatic departure from the way the Corps once did business. Under the 1986 legislation, the cost-sharing relationship among the Corps and its sponsors changed. Many communities were frustrated by the limited input they had into Corps' decision-making. As one senior manager at headquarters noted: "Prior to cost sharing, and the introduction of project managers, the Corps basically did what it wanted to do. When conflict with a local community arose, the Corps plowed forward with little community input, using its federal mandate to justify its actions."

Corps staff point out that the introduction of cost-sharing spurred a major change in the relationships between the Corps and local and state governments. Once local sponsors began sharing financial responsibility, they wanted more of a say in all phases of project development -- from conceptualization to operation. They also insisted on a steadier flow of information about the project-related activities of district offices. In short, they were no longer content to stand on the sidelines.

As the primary point of contact between the agency and local sponsors, project managers were the first Corps staff to respond to this changing relationship. On their own initiative, numerous project managers began organizing ad hoc groups comprised of representatives from both the Corps and sponsoring institutions. The purpose of these groups was to create a forum where local sponsors and district staff could communicate ideas and concerns, and jointly work out disagreements.



From district to district, these groups have differed in composition and mandate. Some project managers have organized small "project coordination teams" comprised primarily of technical experts to work through a host of technical questions. For example, project coordination teams have taken advantage of their interdisciplinary expertise to draw up plans for rerouting municipal traffic during heavy construction. Other project managers have organized broader public advisory committees with members appointed by towns or city councils. Both kinds of groups have been convened at various stages of the Corps' projects.

Small project management teams and larger public advisory committees perform similar consensus building functions. They meet regularly to discuss members' ideas and concerns, allocate roles and responsibilities, and tailor project decisions. Corps technical staff often make presentations about the status of agency activities and respond to requests for information. When serious disagreements arise, the advisory committee setting provides a structured forum in which the parties can work towards an agreement in a non-adversarial fashion.

Project managers emphasize that the Corps and its sponsors are not entirely equal partners. Indeed, there are limits on how much local sponsors can influence the course of decision-making. For example, when faced with a range of possible options, the Corps is often compelled to select the option that is most economically advantageous, even if that is not the sponsor's first choice. Still, consensus building techniques offer sponsors regular consultation. Our interviews suggest that in nearly every case where an ad hoc group has been established to involve the sponsor in project management, it has played a critical role in improving the Corps-sponsor relationship and building community support for the project.

Recently, the Office of Chief Counsel has begun to formalize consensus building strategies by incorporating them into model Project Cooperation Agreements (PCAs). Last Spring, the Corps negotiated a model PCA for flood control projects with the National Association of Storm Water Management Agencies. The terms of the model agreement include a number of provisions designed to encourage consensus building among key project staff from the Corps and local sponsors. For example, there is a formal requirement to establish a project coordination team during the construction phase of all cost shared projects. The purpose of these teams, as stated in the model PCA, is: "To provide for consistent and effective communication." The teams may consider such issues as design, plans and specifications, real property acquisition, contract costs, final inspections, and anticipated requirements for operation and repair. Teams are supposed to be comprised of senior representatives from both institutions and meet regularly until projects are operational.

Following is an example of one project that employed multiple consensus building techniques as new challenges arose:



### Charleston Riverfront Recreation Park

In the late 1980s the Huntington District began work on the development of a riverfront recreation park in Charleston, West Virginia. From the beginning of the design work through construction, the project manager actively sought to involve the sponsor in the administration of the project.

While the reconnaissance study was underway, discussion between the sponsor and the Corps was informal. At each City Council meeting in Charleston, representatives of the Corps would review the current status of the study, and then open up the meeting for a discussion of the concerns of City Council members and other members of the public. While no formal sponsor had been designated at this stage, the project manager involved likely stakeholders as earlier as possible in planning.

As the project moved into the design phase, the project manager suggested creating a design team with representatives from the sponsor, the Corps, and two organizations providing independent funding for the park (an urban renewal authority and a private foundation.) Each organization chose its own representatives. The design team provided a forum for the different organizations to resolve their differences about the design of the park. For example, the city wanted park features which the Corps regarded as too expensive (and beyond the scope of the original project budget.) By meeting face-to-face to explore creative options, they were able to identify changes that satisfied the City's expectations without exceeding the limits of the Corps mandate.

During construction, the mechanisms for local sponsor involvement once again changed. The design team became a seven member project coordination team. Once again, the local sponsor and the Corps selected their own representatives. The team serves as a forum for sharing information pertaining to design modifications and financial developments -- issues that produced sharp disagreement. As the project manager noted: "We use the team to handle all conflicts between the Corps and the sponsor. By meeting regularly we deal with problems as they arise and keep the responsibility for finding solutions to conflict in the hands of the people who are staffing the project, rather than compelling people to seek involvement at higher levels of authority."

#### 4.2.2 Consensus Building in Planning

In recent years, the Corps has undertaken several comprehensive efforts to involve stakeholders in the planning phase of major and highly contentious Civil Works projects. Using facilitated public workshops held throughout a study area, district staff systematically gather input from environmental organizations, community groups, members of the public, federal, state and local agencies, elected officials and others. These meetings are held at several different points during preparation studies. After each round of meetings, district staff carefully synthesize the results of the workshops and use the results to guide further studies. The articulation of stakeholder interests has helped to shape decisions on a range of questions, including: What problems should the reconnaissance study



examine? Which alternatives should be scrutinized further? And, which alternatives should be presented to headquarters and potential sponsors as the district's recommended option?

In each case, a study team made up of representatives from the public affairs and planning staffs has been essential in organizing public involvement programs. At the beginning of the reconnaissance study, this team jointly develops a comprehensive public involvement plan. This plan includes separate and distinct strategies for different constituency groups. For example, in the Central and South Florida Project described below, the Corps convened regional workshops with several hundred participants to familiarize all residents with the purpose of the study and to solicit feedback on certain predetermined questions through the use of response cards. Where there was a need to gather deeper, more technical feedback from a defined group such as local planners, special meetings were held on a regular basis to foster on-going dialogue. Regardless of format, the flow of information was always two-way.

Public meetings are not a new feature of reconnaissance studies. Both the Corps' own policies and the National Environmental Policy Act (NEPA) guidelines require public meetings at designated points. However, their purpose is simply to keep the public informed about agency activities and to give individuals an opportunity to submit formal comments. What is novel about more comprehensive public involvement plans is that they seek not only to provide information to stakeholders, but also to gather and utilize stakeholder views and concerns. Staff from Planning and Public Affairs have redesigned meeting formats to provide real opportunities for the agency to engage with meeting participants. The results are carefully integrated into all decisions of a study team, making these public meetings and workshops an integral part of the study itself.

Many Corps staff agree that a comprehensive and well-thought out public involvement process is valuable, even though it involves a big investment of time, and may provoke controversy and dissent. Consultation helps ensure that the study focus is in keeping with the concerns and ideas of the people living in the study area, thereby minimizing potential conflicts once actual projects are announced. The process of listening and responding to the public's concerns can also produce greater public appreciation of and respect for the way the Corps does business. As the relationship between the Corps and stakeholders in a certain region improves, the groundwork is laid for the future. Other project managers have pointed to concerns they have about the use of consensus building techniques during reconnaissance studies. One cautioned that public meeting processes can be both time-consuming and costly. Another pointed out that sometimes it can be difficult to integrate the results of public meetings into highly technical research activities.





### Central and South Florida Comprehensive Restudy Project

A reconnaissance study was initiated by the Corps in 1993 to assess the possibility of modifying the existing Central and Southern Florida Project. Originally authorized in 1948, the project provides flood control, water supply, and protection from salt water intrusion for almost six million people. However, it has also resulted in serious, unintended impacts on the environmental quality of the Everglades and Florida Bay ecosystems. The study proposed to look at the feasibility of undertaking numerous projects to restore the ecosystem of this 18,000 square mile area, while at the same time meeting the water-related needs of the areas' residents.

Public involvement techniques were key to the study from the outset. A "Public Involvement Technical Input Group," comprised of representatives from the Corps, the sponsoring water management district, the National Park Service, the Fish and Wildlife Service and other agencies was formed to spearhead the development of a formal "Public Involvement Strategy." The purpose of this strategy was to lay out an intensive public meeting process that would be closely linked with each distinct phase of the scientific study.

The public involvement strategy was implemented by the "study team," an interdisciplinary group of Corps and other agency personnel charged with overseeing the reconnaissance study. Before the study team decided which problems to make the focus of the study, ten public workshops were convened at various locations. At these meetings, over 2,200 participants were asked to provide the study team with feedback on questions such as: "What are the problems and opportunities in this area? How do we know there is a problem? How will we know when it is fixed?"

Based on this public input and its own technical analysis, the study team developed a framework of "planning objectives and constraints." In a second round of meetings held at four central locations in the study area, district staff presented results from the first round of meetings, and then garnered the assistance of 750 participants in formulating a long list of possible alternative plans for meeting the stated objectives.

Using stakeholder views as critical input, the study team identified areas of agreement and developed a narrower range of preliminary alternative plans for further study. These plans were analyzed for their technical feasibility and likely economic and environmental impacts. When the results were in hand, the team again organized a series of public meetings. At four locations around the state, participants were invited to provide feedback on the agency's preliminary recommendations and to evaluate the public involvement process as a whole.

Throughout this public meeting process, agency staff also organized smaller, more focused meetings with individual interest groups. For example, representatives from federal, state and local agencies





met with the study team as often as two to three times a week to discuss decisions related to the reconnaissance study. As one district staff person said: "What was unique about this was that we brought in people from other agencies to work with us as a team. They weren't just asked for their reactions to our decisions. They were involved from the get-go in working towards a consensus about how this study should be carried out." Although further feasibility analysis is needed, the Jacksonville district's extensive public consultation and dialogue process helped to generate over sixty preliminary project ideas.

#### 4.2.3 Consensus Building in Project Management

In recent years, project managers have begun changing the way that the agency interacts with stakeholder groups. Before 1988, when the position of project manager was created, there was no single person in a district office who had responsibility for managing the agency's relationships with outside groups. While there were some basic requirements for large-scale public meetings during reconnaissance studies, there were no requirements for public consultation during construction. It was not uncommon for Corps' projects to incite frustration and anger among stakeholders who felt they should be more involved in critical decisions. When project managers came on line, they quickly realized that the often substantial conflict between the Corps and stakeholder groups could inhibit the progress of construction or even halt it altogether. It was this realization that pushed many project managers to begin experimenting with consensus building techniques.

Project managers have tried different approaches. In some instances, they have convened meetings with one stakeholder group at a time. From the Corps' side, those in attendance would typically include the project manager and technical staff who could answer questions and explain detailed plans. In some cases, representatives of the local sponsor have also attended. Agendas have been structured to allow stakeholder groups to express their highest priority concerns and to work with Corps staff to identify options that address those concerns. In several cases, the Corps has significantly altered its proposed plans on the basis of discussions with such groups.

In other cases, project managers have convened ad hoc local committees to represent stakeholder interests in on-going meetings with agency staff. Typically, project managers ask the principal stakeholder groups to identify representatives to be part of the advisory committee. If such a committee has already been formed by citizens on their own, then the project manager might simply approach the chair and ask about meeting with agency staff. Once a committee has been established, stakeholders have the opportunity to meet regularly to: (1) hear project updates from Corps staff; (2) ask questions; (3) identify information they would like to hear presented; (4) propose and discuss modifications to the project design; (5) identify ways the committee or its individual members can help move the project forward; and, (6) provide feedback on specific questions or options presented by Corps staff.



Project Managers who we interviewed were universal in their view that consensual approaches to project management have markedly improved the relationships between district offices and community stakeholders. They point out that stakeholders are highly appreciative of opportunities to be kept up-to-date on project developments, voice their ideas, and have some influence on agency decision-making. Accepting proposed modifications to projects may be more difficult. Project managers emphasize that there are limits to how much decision-making authority district offices can share. When an advisory committee proposes a modification that requires the Corps to act counter to its mandate or beyond its budget, the agency cannot agree. However, there are numerous examples of committee proposals that have been successfully integrated into design and construction.

On the whole, our interviews suggested that the push to organize and meet with ad hoc citizens groups has reduced conflict, cultivated community support for projects, improved the agency's reputation, and helped to ensure that projects progress smoothly. The only problems cited are the costs and time associated with organizing such processes, and the difficulties Corps staff sometimes experience when managing difficult meetings without adequate training.

#### James R. Olin Flood Control Project, Buena Vista, Virginia

During the design work for a project to construct a new levee in Buena Vista, Virginia the project manager actively sought to involve residents of the community. He worked with the Town Council to convene a seven-member flood control committee. The purpose of the committee was to represent town residents in ongoing communication with the agency. Its members were, for the most part, citizens who were judged by the City Council to be competent spokespeople for the community's interests.

The flood control committee became the principal forum for settling disagreements between the Corps and members of the community over the design of the levee. In regular meetings with the project manager, the flood control committee heard updates on the progress of design tasks and then discussed and debated various design features. In several cases, the Corps opted to adopt the committee's recommendations. For example, the committee was eager for the levee to provide some recreational benefit to the community.

When they suggested an incidental hiking path across the top, the Corps' project management team worked to incorporate this feature into its plans.

The project manager unequivocally stated that the effort to involve local residents in making design decisions was a "tremendous success." The Corps sought to respond directly to the committee's input when it had the flexibility to do so. This gave the community a new appreciation for the Corps' willingness to take its concerns seriously. Moreover, the dialogue actually improved the project



from the perspective of both the Corps and the town. By the time the project reached the construction phase, there was so much community support that the committee was disbanded. A City Engineer was then hired to work more closely with Corps technical staff on detailed design and construction tasks. This partnership has been so successful that the city engineer now shares office space with the Corps resident construction staff.

#### 4.2.4 Consensus Building and 404 Permitting

Corps Regulatory staff in several districts have used consensus building techniques during the wetlands permitting process. Faced with vocal opposition to a proposed project, regulatory staff were concerned that a unilateral agency decision would generate acrimonious discord and, possibly, litigation. In an effort to avoid this outcome, they decided to replace the usual process of inviting stakeholders to submit written comments with a more participatory process that brought them face-to-face in a facilitated dialogue. The aim of the dialogue was to increase the degree to which stakeholders could have a say in Corps decisions without foregoing the agency's responsibility for regulating discharges of dredge and fill material. Each stakeholder group was asked to choose representatives. These representatives met to review the permit application, discuss their concerns, and work towards an informal agreement.

The Corps staff participating in these consensus building efforts believe that they were instrumental in building support for the Corps' final decisions. Even though the Corps retained the ultimate authority to issue the permit, private corporations and national environmental groups were given the opportunity to provide direct input into the specification of conditions. As one Regulatory Branch chief stated: "Whereas paper comments tend to be general and nebulous, spoken comments can detail specific concerns. People want to be heard, not just write in for public comment. Consensus building lets people get their thoughts out. People don't get that kind of satisfaction when they are just writing in." This kind of participation in decision-making, even though it has strict limits, generates a sense of ownership over the final permit once it has been issued.

Corps regulatory staff assert that consensus building techniques help them avoid conflict down the road that may arise in the form of a lawsuit by a third party or a regulatory appeal by another federal agency. By bringing together all of the organizations and individuals likely to be affected by the outcome of a permit decision, the Corps has found a means of engaging stakeholders in a collaborative effort to respond to all stakeholder needs. At the same time, Corps regulatory personnel assert that they always remind the participants of the limitations imposed by law. Consensus building techniques enhance -- but do not replace -- the Corps' decision-making authority.



#### Vicksburg Gas and Oil General Permit #19

In 1987, the Vicksburg District faced an impasse. The Regulatory Branch was about to issue a General Permit for gas and oil exploration in the wetlands of Louisiana and Mississippi. The Corps suspected that neither the petroleum explorers nor environmentalists would be happy with the outcome. Environmentalists seemed set against any general permit for exploration. They felt that the proposed activity would have major environmental impacts and should be permitted only on a case-by-case basis. Industry claimed that without a general permit the costs and time associated with gaining authorization to drill would be debilitating.

Despite significant skepticism that a dialogue could bridge the parties' differences, Regulatory staff secured approval from the District Commander to try a consensus building effort. The staff worked with a professional facilitator to design a four meeting process involving all the stakeholders who had submitted comments on the application. Stakeholders included such groups as the Gas and Oil Board, the Sierra Club, and Ducks Unlimited. The Corps recruited staff trained in facilitation from other functional divisions to serve as facilitators during the meetings. While these facilitators were knowledgeable about the regulatory process, they refrained from giving any substantive advice in order to maintain the parties' trust in their neutrality.

Through informal, facilitated dialogue, the group was able to design a permit that both industry and environmentalists could accept. The permit included specific conditions that addressed the concerns of environmentalists about the impact of drilling in wetlands areas. Explorers could apply for only a limited number of authorizations per year. If drilling occurred in a wildlife refuge, explorers would have to coordinate their work with refuge managers. At the same time, explorers were assured that their drilling activities could be permitted swiftly and efficiently through the general permitting process. This consensus building effort not only resulted in a successful issuance of a permit in 1987, the permit was easily renewed again in 1992.

#### 4.2.5 Consensus Building and Environmental Restoration

Corps staff in the Military Program's Environmental Restoration Division have used consensus building techniques to improve communication with community stakeholder groups during the clean-up of hazardous waste sites. Accurate preliminary engineering studies and innovative remediation strategies are not enough to ensure successful clean-up. When angry citizens feel excluded from decisions that they believe will have tangible impacts on them, they often react by attempting to slow, if not halt, progress. They may also exert political pressure on state and federal elected officials or bring legal action against the Corps.



Consequently, the Department of Defense and the Army Corps have sought to involve citizens in clean-up projects by convening local community advisory committees and restoration advisory boards (RABs). While these advisory committees may be accompanied by sophisticated public information campaigns, their goal is not just to "sell" projects, but to understand and respond to the concerns of the affected communities. Representatives of different stakeholder groups meet together with agency staff to articulate interests and to explore solutions to issues that have raised citizen concern. As the Department of Defense's FY93 *Annual Report to Congress on Defense Environmental Clean-Up Program* stated: "Such a focus reduces alienation, encourages ownership in the process, and ensures success reaching a consensus on the final solution."

#### Former Camp American University

When buried World War I chemical munitions were uncovered in an exclusive northwest Washington, D.C. neighborhood in January 1993, the Department of Defense was faced with a highly visible situation that posed a potential threat to 1,300 homes, 100 businesses, two universities, and several embassies. After nearly four weeks of work by the Service Response Team from Aberdeen Proving Ground, Md., 141 munitions were recovered from an old burial pit near the original discovery. In February 1993 the Baltimore District took on a larger role of investigating the entire 660-acre site of the former Camp American University for additional munitions.

To keep the community informed of the project, the Corps undertook a sophisticated public information campaign, including two on-site public affairs specialists, a bi-monthly newsletter, fact sheets explaining the survey technology and possible chemicals that might be found, a staffed visitor's trailer, and a toll free hotline. In addition, in the first two weeks, the Corps held individual zone meetings in nine work zones and solicited volunteers to act as zone captains for the duration of the project.

In weekly meetings, the Corps updated the zone captains on the clean-up process, while representatives updated the Corps on community concerns. The zone captains reviewed Corps' communications with the community, from the newsletter to specific letters, and also helped calm neighbor's fears when individual evacuations of sites, as part of the investigation, were required. In addition to the zone captains, the Corps worked closely with a neighborhood group of concerned lawyers to draft a right of entry agreement that would be acceptable to the community. The survey of the site required the Corps to acquire rights of entry from 638 property owners. Although 73 disturbances in the ground were found that could not be identified without evacuation, in the end, only 3 munitions and several empty casings were actually found.

Though the project could have been a public relations nightmare, especially since the neighborhood included the homes of congressional representatives, ambassadors, and local and national media



**Portland District  
Environmental Advisory Board**

**Whereas:**

Wetlands in the State of Oregon require wise management, and Resources for effecting that management are limited, and Fostering communication among affected groups ultimately benefits the wetlands of the State of Oregon.

**Therefore:**

Portland District, Army Corps of Engineers, has established an Advisory Board to help foster such communication on issues pertaining to the regulation of wetlands.

**Mission Statement:**

We are a team committed to working together as professionals to ensure that the concerns of the public in Oregon are fairly considered.

**Objectives:**

- Foster open, honest, continuous and effective communication.
- Anticipate and identify areas of concerns and achieve early resolutions.
- Enhance relations among public agencies and the private sector.
- Identify methods to improve efficiency of the Regulatory Program while maintaining the ability to protect important environmental values and achieve multiple objectives.
- Foster public awareness and understanding of the Regulatory Program.

This agreement establishes a working relationship and does not limit any rights otherwise available under law.

professionals, sophisticated use of consensus building techniques coupled with a public information campaign enabled the Corps to complete the project without major opposition or complaint.

#### 4.2.6 Consensus Building and Making Policy

Consensus building can aid Corps staff in developing consistent and effective policy at the district, division, and headquarters levels. While consensus building efforts are often centered around a



particular project or permit, the process of enlisting stakeholders in decision-making has also been utilized to help the Corps develop broader policies and policy direction.

Policy dialogues are similar to the Corps' efforts to *partner* with umbrella professional organizations representing contractors or customers (for example, see "Partnering with the American Association of Port Authorities" in *Section 3.2.3*). In both, the agency enlists the assistance of key stakeholder groups (which may have markedly different views from agency staff) in designing policies or procedures that will govern the agency's work in the future. In policy dialogues, senior managers at headquarters or in district offices convene different federal, state or local agency representatives to work together on the formulation of substantive regulatory policies. Corps officials may also invite other non-agency stakeholder groups, such as national or regional non-governmental organizations (NGOs) to jointly hammer out policies that may be controversial.

Though a policy dialogue may be a one-time effort to clarify how the Corps will carry out its mission, such collaborative exercises can serve as a model for how different agencies and other stakeholder groups can work together to produce well designed, widely supported policies and guidelines. Effective policy dialogues can also improve long-term relationships between organizations that may have a long history of mutual mistrust.

#### Portland District Environmental Advisory Board

The Portland District had been hampered in its work by opposition from environmental groups. The process used to design a special area management plan for wetlands in one of Portland's emerging industrial areas left many groups particularly bitter. In order to improve relationships and to allow broader input by various interests into the District's policy making, the District Commander created an Environmental Advisory Board.

The Corps hired an outside facilitator to help design the process for convening the Board. Developers, municipalities, and various environmental groups such as the Oregon Natural Resources Council and the Nature Conservancy were asked to select representatives. At a later point, the Farm Bureau was also included to ensure representation of rural interests.

First, Board members identified a list of issues of concern such as wetland conservation plans, the use of general permits, and Corps' cooperation with local governments. At the end of this phase, the Board held facilitated public meetings to inform the broader public of the selected issues and to obtain feedback. Environmental interests, in particular, wanted to "check in" with their constituents before proceeding further. At these meetings, under a poster designed for each issue, the public noted comments and concerns. In addition to these meetings, the public was kept informed of the Board's work through a Portland District newsletter called Cattales.





Then, the Board considered the general concerns expressed by the public and focused on three major policy issues, including enforcement of wetlands permits, innovative options for mitigating development in wetlands, and public notification about Corps' actions. In the final phase of its work, the Board established a working group of Board members and other technical advisors to craft detailed recommendations in one of the policy areas: compliance enforcement. While the Corps would have liked to address the other two policy areas as well, limited Corps resources made it necessary to limit the working group's scope.

While the working group is now hard at work on compliance enforcement, the entire Board continues to meet approximately every other month to facilitate exchange of information among members.

### **4.3 Analysis**

4.3.1 The use of consensus building tools to minimize conflict and improve the work of the Corps is increasing.

Innovative uses of consensus building are on the rise. In several district offices around the country, staff from the Office of Public Affairs, the Division of Planning and the Division of Programs and Project Management are working together to design new ways of interacting with local sponsors and stakeholders. Regulatory staff have engaged permittees and concerned citizens in collaborative efforts to design permits that balance competing interests and concerns. Initial successes with consensus building techniques have often led to more systematic efforts to involve sponsors and local community groups in Corps' decision-making. One project manager noted that his first experiment involving a local sponsor in the earliest stages of a project's development was so successful that he and other project managers in his district now use a similar approach in every project they undertake.

Their efforts exhibit a remarkable degree of inventiveness. In every new project employing consensus building strategies, Corps staff confront a host of questions, including: Who should be represented? What issues should the ad hoc group address? How often should the group meet? How should meetings be managed? Should the facilitator be a Corps staff person or an outside professional? Corps staff have formulated answers to these questions based on the unique needs of each project. Each experience has, in turn, improved subsequent consensus building efforts.

Still, the use of consensus building is sporadic across the country. Up until now, the Corps' use of these techniques has depended on the initiative of individual district staff. There has been no recent explicit encouragement by headquarters. Nor has any special written guidance or training on how





to design a consensus building process been made available to district staff. Many people we interviewed emphasized that, in recent memory, efforts to improve the Corps' ability to manage conflict have been focused exclusively on expanding the use of partnering and ADR in military and civil contracts. As one senior manager at headquarters pointed out: "Most Corps staff still think that conflict management is something you do during contracts, as a last resort to litigation. Little thinking has been done about how a broader the use of these techniques could assist district staff who deal with diverse constituencies on a daily basis." Thus, Corps awareness of where and how to use consensus building techniques is still nascent.

In the Corps' regulatory work, we know of only a few cases where district offices have brought parties together to discuss general permit conditions in a facilitated dialogue. Study managers and project managers are still unfamiliar with this approach. In our interviews, most Corps staff emphasized that the use of consensus building techniques will continue to be sporadic as long as there is minimal guidance from headquarters, few opportunities to participate in training courses, and even more importantly, few if any mechanisms for those who have used consensus building techniques to share their experience with counterparts in other district offices.

4.3.2 Consensus building produces significant benefits that enhance both the quality of the Corps' work and the agency's relationships with local sponsors and other stakeholders.

While information about the results of consensus building in Corps districts is highly anecdotal, it confirms that there are important benefits to restructuring the way the agency interacts with groups that have an identifiable stake in the outcome of its work. In numerous discussions with project managers and regulatory staff who have actively explored these techniques, several benefits were mentioned.

- **Improved Relationships:** Headquarters and district staff note that in the past the Corps' relationships with many outside actors was characterized by a notable degree of mistrust, dissatisfaction, and even animosity. Even now, there is substantial conflict between the Corps and various stakeholders affected by its actions. Angry stakeholders can often slow or halt planned projects through political pressure or litigation, costing the agency time and financial resources. The need to improve relationships with stakeholders has been an important impetus to experimenting with consensus building.

Consensus building improves relationships by providing a forum in which public understanding of a project can be enhanced. Through dialogue during the formative stages of a project, the Corps can dispel misconceptions, answer pressing questions, and pinpoint the information stakeholders feel they most need to evaluate proposed actions. For example, one Project Manager described his use of consensus building techniques to keep town residents informed about a highly sensitive flood



control project aimed at flood-proofing 540 homes and businesses. He noted that there was significant anxiety among town residents about how this flood proofing would be carried out and whose homes would be purchased by the Corps or relocated. A local committee was established to provide a forum where citizens from the town could meet with the Corps and discuss their concerns. At quarterly meetings, staff from the Corps brought residents up-to-date on the projects' status, and discussed their next steps. When highly technical questions surfaced, the project manager brought in agency experts who could address these questions with clear, straightforward explanations and technical data. Although primarily informational, this forum fostered a sounder relationship between the Corps and the community because it engaged community residents and agency staff in a collaborative process to gather and share information. The Project Manager said: "Those who participated learned what was coming down the pike well in advance. This eliminated surprises, and cultivated the trust of this community that we would keep them informed about all key project developments."

Giving stakeholders an opportunity to "have a say" is also critically important in establishing trust. Consensus building techniques go beyond perfunctory public meetings, where technical experts announce what the agency intends to do and participants are given only a brief opportunity to react. In consensus building, stakeholders are asked to provide direct input into the decision-making process before final decisions are made. Consequently, stakeholders are usually far more willing to listen to the perspective of agency staff, to accept the constraints on Corps decision-making, and to cooperate when there is some assistance they can offer. As one project manager said about a locally flood control committee appointed to work with the agency on project design: "We had tremendous success. By keeping communication lines open and seeking input where we had some latitude in our decisions, we built strong support for this project throughout the city."

Consensus building can also enhance long-term relationships. In regions where the Corps carries out successive and often interrelated projects, the positive benefits of one consensus building approach can spill over into other projects. For example, in the South Atlantic Division's Central and Southern Florida Comprehensive Restudy Project (see *Section 4.2.2*) efforts to involve all constituencies early in design and management have transformed the Corps ability to work with other institutions in this part of the country. One project manager said: "People have gained a new appreciation and respect for the way that the Corps does business. In the future, we will be better able to work with the many parties and avoid litigation."

**Avoided Conflict:** Consensus building holds the potential for preventing the eruption of disputes which could lead to litigation or lengthy administrative appeals. For the Corps, it represents a major shift away from the conventional means of managing conflict with sponsors and stakeholder groups. As in partnering, the emphasis is on solving problems jointly before positions harden and disagreements escalate.



### *North Carolina Deep Harbor Dredging*

One district office in Wilmington North Carolina planned to dredge a deep harbor, and dispose of the dredged material on a beach along a barrier island. Realizing that the decision about where on the beach to place the material would have significant impacts on a number of stakeholder groups, the project manager worked with the town to initiate a series of informal meetings with each group. Homeowners were eager to have the sand placed near their property as a means of reducing erosion. Fisherman were concerned that the placement of sand near the town piers would reduce fishable waters. Surf fisherman were worried that the sand would impede the movement of surf fish. Town officials were eager to prevent the project from producing unwieldy political conflict.

At each meeting the Corps presented the options identified by Corps staff. Representatives of stakeholder groups were invited to voice their concerns, suggest how the options could be modified to better meet their interests, or propose entirely new options that the agency had not yet considered. This modified list then became the basis for discussion at the next stakeholder meeting. Through this iterative process, the Corps was able to identify a location for the dredged material that all the groups could accept.

Several Corps staff have noted that when there is no joint problem solving forum, conflict quickly elevates to a high political status as local residents or the sponsor contact their Congressman and demand support. The project manager in the North Carolina case described above said: "People felt that we had taken their concerns seriously, and that we had made the best possible effort to accommodate them. In the end, that was enough to avoid any major protests about our decision for a disposal site." This outcome contrasts sharply with what might have happened had no efforts at consensus building taken place. As the project manager pointed out: "Any group could have brought an injunction against the Corps to stop the dredging. If the injunction was issued while dredging was already underway, the costs would have been enormous."

Consensus building techniques have also been used effectively to avoid conflict over the issuance of general or individual permits to dredge or fill wetlands (see *Section 4.2.4*). Vicksburg District staff used a consensus building approach to negotiate the terms of a controversial general permit for oil and gas drilling. With the help of committed Corps staff, trained in facilitation, the gas and oil companies, public interest groups, and state and federal agencies were able to design a general



permit that everyone could live with. One staff member of the Regulatory Branch said of the process: "I didn't think it would work. I didn't see a resolution. I thought the Corps would just have to take a stand and live with it. But, the general permit was successful, and in 1992, it was easily reissued."

◦ **Better Projects:** Some Corps staff who have used consensus building techniques assert that they are at the foundation of higher quality projects. When the Corps invites a local sponsor to provide input into the design of a project, the final designs are likely to better reflect the needs and preferences of the sponsor than if the Corps designed the project with the sole aim of meeting its own internal design standards and policy guidelines. Project managers point to many instances in which representatives of a local sponsor requested functional or design features that could be achieved within the bounds of the project's proposed scope and financing. Even when these requests cannot be accommodated within the agency's budget, Corps project staff have often been able to work with the sponsor to identify other means of financing. In short, consensus building techniques are a vehicle for generating "mutual gains."

For example, in one flood control project, a project management team comprised of seven members appointed by the City Council voiced a desire to see more recreational value built into the project (see *Section 4.2.3*). The Corps addressed this concern by adding an incidental hiking lane along the top of the levy. With a small investment to construct access points along the path, the Corps was able to add a feature to the project that made it far more agreeable and useful to the host community. The potential for using consensus building techniques to locate mutual gains also exists in the Corps regulatory program. When proposed permits generate significant controversy, dialogue with stakeholders including state and federal agencies, public interest groups, or members of the public can lead to the design of a permit that is sensitive to the multiple concerns of these groups while still meeting the regulatory mandates of the Corps.

Projects are improved not only by inventive suggestions that emerge from dialogue, but also from the assistance that different stakeholder groups provide during implementation. As the Corps has begun involving local sponsors and other stakeholder groups in collaborative dialogue, some district staff have actively sought opportunities to capitalize on the knowledge, technical expertise, and political skills of these groups.

In California's Sepulveda Basin, the Corps district office organized a wildlife advisory committee to bring local environmental interests into a collaborative working relationship with the agency during the design of numerous recreational projects. Meeting monthly, this Committee played a key role in securing additional funds for habitat restoration from a lawsuit settlement. They are now actively working with Corps staff to formulate plans for revegetating a major portion of the Basin. In Pike County Kentucky, a local citizens group formed to work with the Corps on a flood control



project that had a precarious financial future due to the nature of its Congressional authorization. According to the project manager: "Without this group, we probably wouldn't have a project today. They brought enough pressure to bear on Congress and headquarters to make sure we got the funding we needed to move forward." Whether assistance comes in the form of information, technical expertise, or political pressure, it can be a valuable asset to district staff.

4.3.3 The use of consensus building techniques may be constrained by concerns about cost effectiveness, fear of losing authority, the traditional culture of the Corps, and conflicting agency mandates.

While there appears to be ample opportunity for using consensus building techniques in the Planning Division, the Programs and Project Management Division, and the Regulatory Branch, Corps staff agree that there are several major obstacles which inhibit its wider use.

- **Concerns about Cost Effectiveness** Consensus building requires time and money. According to our interviews, this fact alone can discourage Corps staff who are accustomed to making unilateral decisions from undertaking a consensus building process. Quickly making a decision after a review of pertinent technical information may appear far more cost effective than slowly and painstakingly gathering the support of diverse stakeholders. As one Regulatory Branch Chief pointed out, with over 3,000 permit actions per year, committing one project manager to an on-going meeting process can significantly reduce staff resources for other essential tasks. In addition to staff time, the cost of employing outside expertise to help facilitate meetings can be expensive.

However, when there are multiple stakeholders with diverging interests, the assessment of whether consensus building techniques will be cost effective must take into account the longer-term costs of failing to address the concerns of these stakeholders. Unpopular decisions can lead to usurpation of the Corps' responsibilities by other federal agencies, angry public protest, customer dissatisfaction, and/or costly litigation. Corps staff should be encouraged to compare the costs of consensus building against the costs of the most likely alternative. A simple example will illustrate this point. In one district, the denial of a permit for the improvement and realignment of a U.S. highway led to a project's demise. But years later, concerns about the condition of the old road and economic growth in nearby communities brought the highway project back to life. The Corps' regulatory staff must now consider this project again. Because the project has high visibility and Congressional support, another outright denial would impact the Corps' reputation adversely. These factors have led the project manager to agree to a consensual approach to reviewing the permit application.

It is important to note that consensus building techniques may *not* always represent the most cost effective means of advancing a decision. When projects have relatively few stakeholders and



involve few contentious issues, these techniques may not be practical. Moreover, when the Corps has sole decision-making authority, and will suffer few negative consequences if it makes unilateral decisions, the benefits of consensus building may not outweigh its costs.

◦ **Fear of Losing Authority:** Some senior managers have not supported consensus building because they fear it may become a vehicle for their staff to avoid hard decisions, and ultimately, to abdicate their statutory responsibility. One Corps Regulatory official stated: "Corps' people need to be decisive. They don't need ADR and consensus building, they need courage . . . . We shouldn't have alternative processes to avoid doing what is right." As long as this fear persists, many top level managers will view consensus building as untenable. However, as some regulators and project managers have shown, consensus building can enhance rather than usurp the Corps' decision-making authority. Speaking about the Vicksburg general permit, one staff said "The result of the consensus building effort was a *much stronger* general permit. It was more valid in the eyes of the parties."

Corps staff in the Regulatory Branch are also particularly concerned about the possibility that a facilitator may usurp the agency's legal authority during a dialogue with stakeholders. They note that facilitators who are not trained in the Corps' rules and regulations may propose agreements that require the Corps to act in conflict with its own legal mandate. As one regulator stated: "Using facilitators can lead to problems because they want to balance everybody's concerns equally when we cannot because of the law. We don't want to give the public the wrong impression." Many staff pointed out that consensus building techniques are only effective when hired facilitators have a clear understanding of the Corps' mandates, rules, and regulations, as well a basic familiarity with the technical issues in question. The Corps has a responsibility to remind participants, frequently if necessary, of the bounds of both law and engineering.

◦ **Traditional Culture:** Consensus building hinges on collaboration among different Corps staff. When project and study managers convene a dialogue among multiple stakeholder groups, they need the assistance of staff from different functional divisions. For example, study managers and project managers are the main points of contact between the Corps and the outside world; it is typically their role to develop a consensus building strategy and to oversee its implementation. Technical staff from Planning and Engineering are often called upon to make formal presentations on the progress of a study, project, or permit process. They may also be asked to help integrate results into the technical decisions made in each of their "stovepipes." Staff from public affairs may provide essential support in developing the strategy and managing the multitude of logistical tasks associated with organizing meetings and public information.

Project and study managers have found that encouraging internal collaboration among functional divisions can be difficult. The agency's traditional and hierarchical stovepipe organization reinforces the independence, and even isolation, of different functional areas. Thus, when project and study





managers seek to engage different functional staff in designing and implementing a consensus building process, they often meet resistance. "We don't do it that way," or "That's not our responsibility," are common replies. Consensus building not only requires a change in the way the Corps relates to outsiders, it also requires a change in the way staff relate to one other.

Partnering has paved the way for more lateral collaboration by bringing field and district staff together in partnering sessions and encouraging collaborative problem solving. The creation of the project management function in 1988 also helped. As one senior manager at Headquarters explained: "Project managers were introduced in part to aggressively counter the resistance among stovepipes to working together." While this resistance has substantially declined since this organizational change, it still exists. The value of fostering internal collaboration that crosses disciplinary lines needs to be more widely recognized in the Corps' district offices.

◦ **Conflicting Agency Mandates:** In the Regulatory Branch, conflicting agency mandates can impede the use of consensus building techniques. If the Department of Transportation's mandated objective is to build a highway across a parcel and the Corps' obligation is to protect the parcel as a wetland, the two mandates are at odds. If a Corps-supported consensus building effort leads to an outcome that leaves another federal agency dissatisfied, that agency may attempt to subvert the Corps' efforts. In addition, the numerous regulators, diverse mandates, and overlapping jurisdictions that affect any one project may greatly confuse the public and make consensus building that much more difficult. Of one facilitated consensus building effort surrounding a highway expansion, a regulator said: "DOT held the first public meetings. Then the Corps comes in. Then, EPA arrives. The public is very confused by all these diverse players. It seems as if it were never decided who was running the show."

Corps personnel should be cognizant of and careful about these kinds of conflicts. Consensus building will not magically make conflicting statutory mandates and competition between agencies go away. But, consensus building and partnering techniques can help Corps staff to better understand the interests and concerns of other agencies. Lingering and historical differences may be as much a factor of tradition as of conflicting interests. Partnering at the highest levels between the Corps and other federal agencies may help to highlight common goals and ease historical tensions.

#### **4.4 Opportunities**

Given our analysis, and after extensive interviews with Corps staff, we have identified the following opportunities for the expanded use of consensus building techniques in the Corps. Following the identification of these opportunities, we detail several next steps necessary to achieve them.



- **Consensus building can be used to improve the preparation of reconnaissance studies.**

Corps staff recognize the value of seeking stakeholder input into the design of reconnaissance studies. When projects are likely to be controversial, involving stakeholders early in identifying problems, selecting options for further study, and narrowing those options can be an effective means of avoiding more serious conflict later. The Corps should encourage planning staff in each district to collaborate closely with public affairs staff on the development and implementation of comprehensive public involvement strategies for each reconnaissance study. The cornerstone of these strategies should be a meeting process which provides stakeholder groups opportunities not only to voice their concerns and ideas but also to help shape the final study. In today's environment, projects launched without key stakeholder support are likely to be delayed by aggressive opposition or never built at all.

- **Consensus building is needed at various stages in the development of projects, from the preparation of feasibility studies through final design and construction.**

Consensus building efforts have a role to play in minimizing conflict and improving the Army Corps' relations with customers, community residents, other federal agencies, and environmental groups. Some project managers have already used consensual approaches to managing these relations during feasibility studies, final design and construction. The results have been undeniably positive. These initial successes suggest that the Corps should develop more systematic plans for extending the use of consensus building techniques. Moreover, the Corps should consider ways of reflecting on the lessons that have been learned from the sporadic but effective experiments undertaken by self-starting district staff.

- **Consensus building in general permitting and policy-making can aid the Regulatory Branch of Civil Works in protecting the nation's wetlands.**

Regulatory staff have already employed consensus building techniques to develop general 404 permits and regulatory policy at the district level. By engaging stakeholders in decision-making, regulators can avoid conflicts with other agencies, environmental groups, and private developers and improve long-term relationships while at the same time fulfilling their statutory mandate to protect the nation's wetlands. The innovative uses of consensus building techniques in the regulatory branch will require training specifically for regulatory staff. As one staff member said: "When people I work with hear the term consensus building or ADR, they think of techniques like a mini-trial. They need assistance and training to learn how to apply these techniques to the specific situations in regulatory."





## **4.5 NEXT STEPS**

Much like the period previous to the formal initiation of partnering, consensus building techniques have not received top-level support or formal approval through policy statements and the purposeful development of expertise at Headquarters. The partnering program recognized and legitimized a form of project management that was already being practiced by some resident engineers. Ad hoc consensus building efforts already underway need that same kind of recognition and support.

In addition, district and field level staff need training. While some individuals may be able to propose and manage an effective consensus building process on their own, most will not be prepared to do this until they have formal training and guidance. Effective consensus building requires a host of skills, including negotiation, facilitation and dispute systems design. These must be learned, practiced, and improved upon. Moreover, while many of these skills are general, the circumstances and limitations of particular functional divisions require that staff have tailored training. The needs of Regulatory staff differ, for example, from the needs of Program Management staff.

In addition to top-level support and training, the in-depth experience of those Corps staff who are currently using consensus building techniques should be shared with other functional and geographic divisions. What one Project Manager in Kansas City learns ought to be shared with another Project Manager in Portland. Information shared across districts should include not only ideas for how to design consensus building efforts but also lessons learned from efforts that have not been entirely successful.

We recommend the following next steps to achieve these goals.

### **4.5.1 Encourage project managers to use consensus building techniques through top level attention and the development of model PCAs.**

In order for project managers to serve as conflict managers in the Corps' day-to-day business, it is essential that Headquarters explicitly recognize this role. Headquarters needs to emphasize that consensus building efforts are an important part of a project manager's work. This can be accomplished through policy statements, training courses, and the dissemination of success stories demonstrating how consensus building techniques can forge positive working relationships with stakeholders and project sponsors.

The Programs and Project Management Division, with assistance from the Chief Counsel's office, should continue to develop model Project Cooperation Agreements (PCAs) with national trade associations. These PCAs should include specific provisions describing how the Corps and its customers can engage in collaborative problem solving. For example, Headquarters could include



in every model PCA the stipulation that the Corps and the sponsor will create a Project Coordination Team. These teams could serve as an important impetus to consensus building.

In addition, the staff of the Office of General Counsel should serve as a resource to district and division staff as they negotiate these agreements. Legal staff at Headquarters can offer valuable advice to project managers about how to structure Corps-sponsored relationships. Each project manager should be encouraged to negotiate a PCA that fits the unique needs and concerns of its sponsors.

#### 4.5.2 Legitimize the use of consensus building in regulation.

Headquarters should support staff in the Regulatory Branch who are attempting to utilize innovative means for generating consensus when permits are being issued or policies made. First, Regulatory Guidance Letter 87-4 should be revisited and reissued. It expired in 1989. Thus, no formal Corps-wide guidance for partnering, consensus building, or ADR exists. When the Guidance Letter is revised, the lessons learned from using these techniques should be incorporated. Second, Headquarters should highlight successful uses of consensus building techniques in various districts across the U.S. by disseminating case studies describing success stories at conferences for regulatory staff and designing training for district offices.

#### 4.5.3 Gather feedback from regulatees.

The Regulatory Branch ought to consider a national conference similar to the Corps-customer conference held for project managers. While regulatees must adhere to a different set of rules and regulations from local customers, they have valuable feedback to provide on how the Corps can deliver quality services in a full spectrum of activities from permitting to enforcement. The Corps should take Portland's Environmental Advisory Board as a model, inviting the participation of such interests as states, municipalities, developers, and environmental groups. While the sheer number of players would preclude inviting each and every regulatee across the country, broad-based interests could be represented by national organizations or professional associations. Such a conference would not only provide an opportunity for regulatory staff at the Corps to open up lines of communication with regulatees, it would also provide an opportunity for regulators within the Corps to reach an understanding about best practices.

#### 4.5.4 Encourage internal communication through dissemination of "war stories," and case studies, and through the use of electronic bulletin boards.

A comment offered by one project manager was echoed in many of our interviews: "We don't have a good communication process to exchange information among ourselves." Project management



staff emphasized the value of exchanging ideas, experiences, and lessons learned in their efforts to develop constructive relationships with sponsors and stakeholder groups. Whenever project managers, study managers, or regulatory staff are brought together at annual conferences or meetings, the agenda should include time set aside to tell "war stories": what worked, what didn't work, what could have been done differently.

The Institute for Water Resources should prepare written materials on consensus building efforts in Planning, Regulatory, and Project Management, using its ADR and partnering case studies as a model. First, IWR should prepare a pamphlet which explores what consensus building is and is not, how it can help Corps managers to fulfill their scope of responsibility, and how it has been used by the agency so far. The conceptual definition we have offered in this report is a starting point, but the agency should consider refining this definition to meet its needs. Second, IWR should prepare case studies. While case studies by themselves do not impart sufficient knowledge to implement a full scale consensus building effort, they can introduce people to concepts, dispel misconceptions, and spark conversations about the use and value of consensus building techniques among staff at all levels of the agency. Since limited resources may act as a constraint, we suggest that, at a minimum, IWR engage district level staff in researching and preparing case studies based on their own experience. However, if the full spectrum of opportunities for using consensus building is to be realized, then it needs general recognition at the highest levels of the Corps. The first step is to develop and clarify the concept of consensus building within the agency.

In addition, the Corps could encourage the lateral exchange of information and ideas through its new electronic mail system by establishing "electronic bulletin boards" for project managers, study managers and regulatory staff.

#### 4.5.5 Provide training in negotiation, facilitation, meeting management.

Line managers who deal with the public almost every day need negotiation training to help them build consensus. This training should be designed so as to meet the special needs of staff in particular functional divisions. Two to three day training courses tailored to Regulatory, Project Management, and Planning, would serve this purpose. Corps staff in these three areas emphasize that to be effective, such \_\_ training should build on case studies and simulations that draw directly from their real, every day experiences in dealing with local sponsors, stakeholder groups, or other public agencies.

Corps staff in the Division of Planning, the Division of Programs and Project Management, and the Regulatory Branch need practical training in facilitation and meeting management techniques. In many of our interviews, Corps staff stated that they are hampered by their lack of training in how to handle people who are resistant to collaborative problem solving, how to deal with fringe groups,



how to keep an agenda moving when a meeting has stalled, and how to structure and facilitate obligatory, large scale public meetings so as to maximize opportunities for interaction and participation. As one project manager noted: "Its not enough just to sit down with everyone and expect to achieve cooperation and agreement just because your all sitting around the same table. This work requires many skills."

One-time, one-shot training is not enough. Staff need follow-up courses where they can share experiences, discuss how to collectively evaluate these experiences, summarize lessons learned, and improve upon skills practiced in the field. As one project manager said: "The first time you hear it, you learn about it with words. But you have to practice it to really learn how to do it. There's a big learning curve." Through such training, the Corps can begin to develop a list of best practices to disseminate to staff.

#### 4.5.6 Develop resident expertise in process design.

In addition to the skills necessary to implement a consensus building process, senior staff in district offices need training in how to actually *design* ad hoc consensus building processes that will respond to the unique circumstances they face. One Corps staff said "There is no formula that will work every time. You have to be flexible, so you can do what works on the spot." Designing a consensus building process requires special skills that differ from the practical meeting management and negotiation skills.

Training in process design should be made available to district-level managers who, by virtue of their position, could propose and initiate a consensus building processes or serve as a resource to others who wanted to implement them. At a minimum we would recommend that participants include Project Managers, Chiefs of Planning, and Chiefs of the Regulatory Branch.

#### 4.5.7 Improve access to professional assistance.

The Corps should develop and disseminate a national, up-to-date directory of experts skilled in consensus building techniques. As one project manager said: "We need a pool of facilitators familiar with the work we do. We should be able to get assistance from people who have experience facilitating the resolution of similar kinds of conflicts in other parts of the country." A national directory of facilitators could prove very useful to staff in district offices when they conclude that they do not have sufficient skills to implement the kinds of processes they feel are necessary. Several Corps staff suggested that professional facilitators would be helpful when the issues under discussion are acutely contentious or when there are difficult parties at the table.



The list should include both firms and individual practitioners. In order to avoid bidding complications, the directory should include all firms who wanted to be listed as long as they provided such basic information as: educational background; the types of services they provide; their substantive areas of expertise; past experience; and, any past work that the firm or individual practitioner has carried out for the Corps. This last point is important because some Corps staff prefer to work with facilitators with little experience with the Corps, while others prefer facilitators who have an intimate knowledge of Corps processes and procedures.



## **5 - ALTERNATIVE DISPUTE RESOLUTION**

### **5.1 An Overview**

The following overview provides a detailed explanation of Alternative Dispute Resolution (ADR) and its many forms, as well as a brief history of the development of the use of ADR in the U.S. Army Corps of Engineers.

#### **5.1.1. What is Alternative Dispute Resolution?**

Alternative Dispute Resolution encompasses a broad range of techniques aimed at avoiding costly, time-consuming litigation by encouraging settlement. In contrast to litigation, and even arbitration (which is one form of ADR), most ADR efforts are designed to settle disputes in ways that preserve rather than terminate relationships.

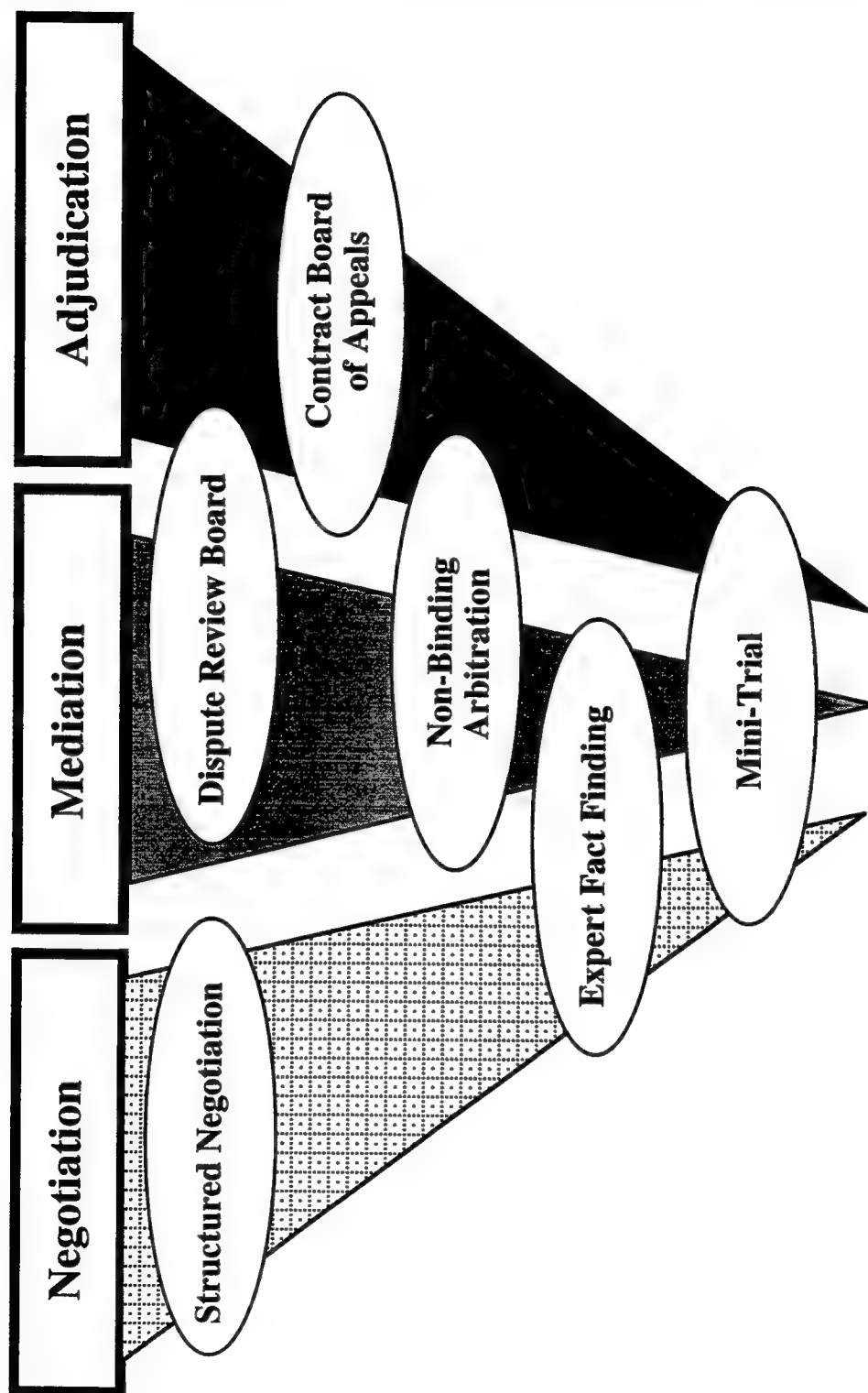
Over the past fifteen years, the use of ADR has grown dramatically, particularly in the private sector. It is taught in nearly 100 law schools and has generated a great deal of scholarly attention. It is enjoying exponential growth internationally and is offered as an alternative to classic international arbitration throughout the world. Though ADR works best when it is voluntary, the enthusiasm of courts and legislatures for its cost-effectiveness has even resulted in a number of states requiring mediation prior to formal trials.

With this growth there has been a corresponding elaboration in form and technique (see *Figure 5.1*). At one end of the continuum is "structured negotiation," in which high level managers work out a procedure for grappling with their differences. As discussed below, the Corps uses "structured negotiation" wherever possible because it is simple and cost-effective. At the other end of the continuum, parties rely on neutrals of various kinds and engage in more elaborate interactions such as mini-trials. The mini-trial is a highly structured form of assisted negotiation in which the parties present their cases (in brief) to a panel of decision-makers usually comprised of a professional neutral and high level officials from their respective organizations.

In the United States, the most common form of ADR (in the middle of the continuum) is "plain vanilla" mediation. This usually occurs after litigation has begun, when parties are aware of the costs and disruption that discovery and court presentations will entail. This type of mediation may involve little more than a facilitator trying to restore communication. Or the mediator may be more active, providing the parties with evaluative comments or other suggestions..



**Figure 5.1: Forms and Techniques of ADR**





In some situations, such as in large construction projects, numerous disputes will arise throughout the life of a project, although their exact nature cannot be predicted. A newer ADR technique (more toward the right end of the continuum) involves "life-of-the-project" assistance. A dispute review board convenes regularly to consider potential claims as they arise during construction.

All along the continuum, ADR involves the use of a professional neutral. The neutral may play a passive, facilitating role, or may be highly active and directive. The neutral may be a process expert, a lawyer, or a subject-matter expert. Key to gaining the confidence of all parties is the impartiality of this individual. Neutrals are assigned varying roles in different kinds of ADR, but all help safeguard the fairness of the process, facilitate discussion, provide technical assistance as needed, and help the parties reach a settlement.

Neutrals often press the parties to confront realistic estimates of the costs and benefits of no agreement, and help them clarify their underlying interests. The neutral's role may be quite simple---providing non-partisan substantive expertise in matters such as soil chemistry or geomorphology. The neutral expert may also mediate, or work together with a process mediator. Or, the dispute may require a more elaborate process to give the parties a "dose of reality," for example, the use of a mock jury in a summary jury trial. Increasingly, skilled mediators use sophisticated "decision tree" or probabilistic analysis to help the parties estimate the expected value of litigation.

All ADR processes share the goal of bringing parties face-to-face to explore the factual basis of their dispute, enhance understanding of the interests that underlie each participant's stated positions, and identify possible joint gains that could serve as the basis for settlement. One of the strongest benefits of ADR is the flexibility it offers. No listing of ADR forms should obscure this important advantage. There is not a predetermined menu; ADR offers a range of processes that the parties, with or without neutral assistance, may tailor to their situation.

#### 5.1.2 The History of ADR in the Corps

In 1984, the Chief Counsel directed the Chief Trial Attorney to lead a task force on ADR options for use in the Corps. The Task Force developed a circular on mini-trials which helped to guide the first uses of ADR. In 1985, ADR was put into practice when the South Atlantic Division conducted the Corps' first mini-trial.

A few mini-trials were held during the following years, but their use was confined to large-scale civil works projects in the Mid-West and West. In response to concerns expressed by field staff that this method of resolving disagreements was remote from the technical side of things and too legally-intensive, the Counsel's office encouraged a variant, called "non-binding arbitration" which afforded greater participation by engineering staff.





Despite these efforts, ADR did not spread rapidly throughout the Corps. Senior managers at headquarters decided that further training and education were needed to raise awareness of the value of these tools and to give people skills they needed to use ADR wisely. In 1988, an Executive Seminar on ADR techniques was designed for senior officials, both civilian and military. This pilot program was then turned over to the Huntsville Division to incorporate into training for district level managers. In addition, the Chief Counsel's Office and Institute for Water Resources (IWR) developed case studies and detailed descriptions of ADR tools for distribution across the Corps. With sustained leadership from Headquarters, the Corps became the first federal agency to develop a comprehensive ADR program for managing conflict in construction contracts. A number of districts began using ADR techniques including mediation, mini-trials, non-binding arbitration, and dispute review boards to resolve disputes with contractors.

In the early 1990's, the Chief Counsel's office, in conjunction with the office of Equal Employment Opportunity and Human Resources, began to explore a more systemic approach to resolving conflicts among Corps' employees through the use of ADR. Jointly, these offices designed a dispute resolution system that incorporated ADR into procedures for handling streams of disputes. Considered together, the Corps' efforts over the last ten years entailed the most comprehensive effort made by any federal agency to institutionalize ADR.

## **5.2 Past & Current Uses of ADR**

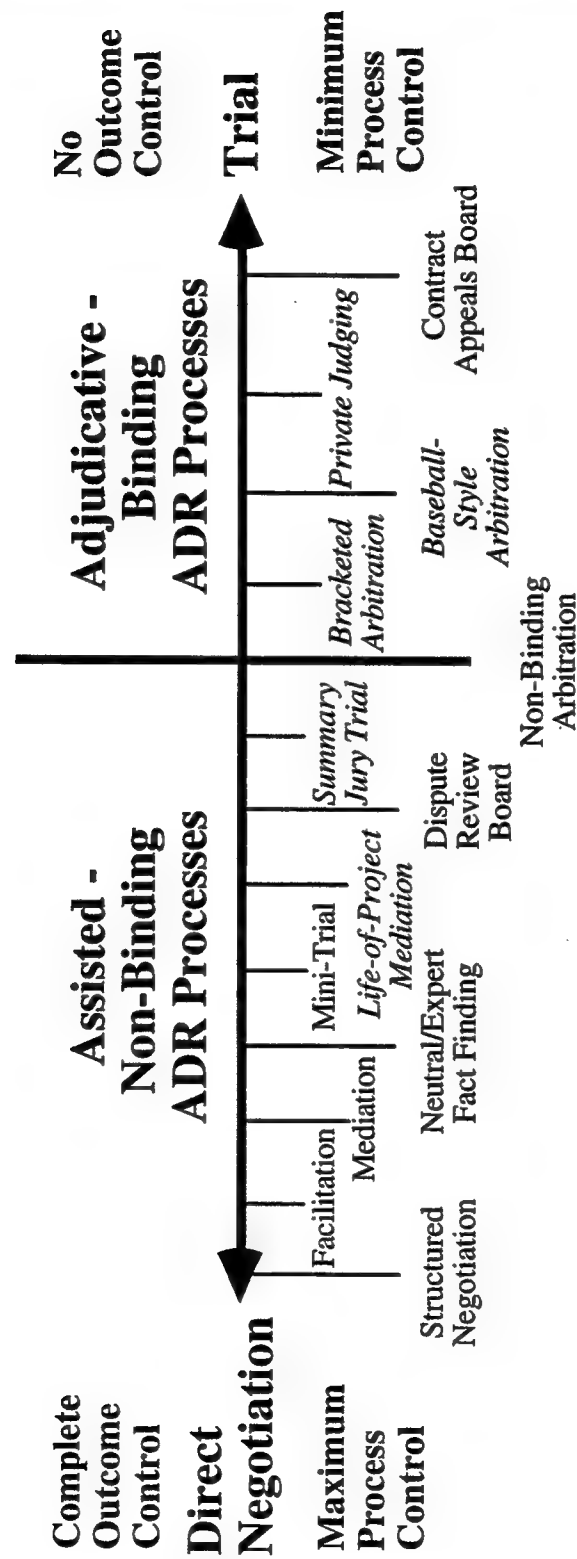
The Corps has chosen to use many of the available ADR techniques. They are arrayed along the spectrum illustrated in *Figure 5.2*. At one end of the spectrum is structured negotiation, which entails a direct exchange between or among the parties without facilitation. In the middle of the Corps' ADR range is simple mediation. At the far end of the spectrum are mini-trials, and other processes where neutrals are given a significant role in both managing the process and in offering substantive recommendations about settlement. The following section describes the principal uses of ADR by the Corps, including hybrid and overlapping forms.

### **5.2.1 The Use of Structured Negotiation**

Structured negotiations have been used primarily to help resolve disputes arising in Civil Work contracts, and in enforcement actions and permitting in the Regulatory Division of Civil Works. When a dispute cannot be resolved either through the normal give-and-take of informal negotiation or elevation up the chain-of-command, the disputants may agree to craft a relatively simple, but more formal negotiation process. No neutral is used.



Figure 5.2: Spectrum of ADR Techniques





The parties usually first choose representatives and agree upon a structure for the negotiation. For instance, in a dispute over the issuance of a 404 individual permit in Florida, the parties agreed to bring in representatives not directly involved in the dispute to exchange information, visit the site, and then join together in a two day meeting to hash out their differences. In some cases, the parties may select district level managers well-aware of the dispute, or, alternatively, representatives from within their organization who are removed from the dispute. A structured negotiation provides for a full and detailed flow of information without formal "discovery". While agreements reached may not always be formalized, often they are often memorialized in memorandum of understanding (MOU) or in permit conditions.

This approach offers several advantages. It brings the parties to the table, and helps them maintain their working relationship. It also opens communication and provides a forum for the negotiation of other issues. Structured negotiation is a least-cost process that does not shut the door to other ADR techniques if it fails.

#### **The Indian Trace Community Development 404 Permit**

A developer in the Jacksonville District had proposed mitigation measures to offset the loss of 1,652 acres of wetlands in a 4,800 acre development. Though the wetlands were mainly mowed and drained pasture, scientists determined that white ibis, crayfish, and warblers used the habitat. Upon review of the Corps's statement of findings, the EPA, and the Department of Fish and Wildlife (F&W), disagreed as to the credit toward offsetting that loss the developer ought to receive for the mitigation measures he proposed. Both EPA and F&W believed that additional mitigation was necessary. After the dispute had been elevated to the South Atlantic Division and remanded again to the District, the Regulatory Chief decided to convene a structured negotiation.

Each party appointed a technically skilled representative who had not been involved in the actual dispute. After a site visit and the distribution of background information, the parties met (without the assistance of a neutral) to develop an acceptable methodology for determining the number of acres that should be credited to the developer for his mitigation efforts. By using an untouched everglades habitat as a baseline, the parties were able to value the improvements mitigation would provide. For every acre of wetland filled, the developer was given credit for 4.5 acres of improved wetlands created, or some 1,460 acres in total. This final determination settled the dispute. The developer agreed to provide an additional 200 credited acres in mitigation measures. Furthermore, the parties successfully developed a general methodology for determining functional values for wetland mitigation that has been used in subsequent permit application decisions.



### 5.2.2 The Use of Mediation and Facilitation

Facilitation by neutrals has been used to help resolve costly and complex disputes over the environmental clean-up of toxic waste sites. Mediation by neutrals has been used by the Corps to resolve disputes over contract claims in both Military Programs and Civil Works, and to deal with internal claims. The term "facilitator" implies that the neutral acts primarily as a convenor and enabler of communication. The term "mediator" implies a more active role, which might involve meeting with parties privately, engaging in "shuttle diplomacy" to move them toward agreement, and offering options for settlement. In contract disputes and in disputes with fewer parties, the neutral usually plays a more mediative role. In disputes with numerous parties, and multiple issues extending beyond contract matters, the neutral may play either a facilitative role or a more active mediative role. In some cases, the neutral may move from one role to another depending on the needs of the parties.

The functions of the neutral are to restore communication, keep emotions in check, help the parties look to their underlying interests, and find a basis for resolution that enhances mutual gains. In some cases, the communication breakdown is so severe that the neutral is fully occupied with restoring it. In other situations, the communication may not be ruptured, but the parties are stuck in fixed positions and cannot understand either their underlying interests or their alternatives to agreement. In such cases, those issues will be the first focus of a mediation effort. The neutral can also be enormously helpful in designing a process so that it maximizes the chances for success. The parties may begin mediation by selecting a neutral who helps them design a process for reaching a settlement. Or the parties may agree upon one type or another of mediation first, and then choose a neutral. The selection of an appropriate, mutually acceptable neutral is crucial to the success of the process. It can be helpful to hold joint interviews. The joint effort in selection often helps to get the parties off on the right foot.

Once the mediator is selected, the parties help prepare the neutral with ample data and careful exposition of their cases, whether more or less formally. If and when agreement is reached, the neutral helps the parties prepare an agreement or MOU which may be designed to bind the parties contractually. The key to mediation and facilitation is the voluntary and consensual nature of the process. Mediation is not binding; parties can opt out of the process at anytime.

Corps staff cite many advantages to mediation and facilitation. First, they emphasize that the process has helped to salvage both relationships within the Corps, and between the Corps and others. Second, they appreciate that the process encourages direct, open communication. This contrasts with formal bureaucratic procedures which often contribute to miscommunication and cause positions to harden. Third, the process is flexible and helps avoid formal litigation that may reflect poorly on Corps managers. Finally, staff like the control over the process mediation can offer. The parties



craft solutions by themselves. Thus, it is often more readily accepted. However, our interviews revealed that mediation and facilitation sometimes meet with resistance. Parties are used to more traditional procedures for resolving disputes. Some may question the objectivity of a neutral, especially if hired by, or from within, one organization. Some believe that mediation will result only in compromise -- "splitting the baby" rather than resulting in "the right" decision.

#### The San Marcos Landfill Clean-Up Facilitated Negotiation

The Department of Defense at one time had used the City of San Marcos landfill, along with the Department of Labor and the City. The Formerly Used Defense (FUD) site required remediation to minimize groundwater contamination. After four years of negotiation, no resolution was in sight. Finally, the Tulsa District approached the other Potentially Responsible Parties (PRPs) about a non-binding facilitated negotiation. Corps staff from Project Management, Environmental Restoration, and Counsel participated. The Corps selected a facilitator to clarify key points and keep the parties "moving along." The Corps helped the facilitator to develop an acceptable agenda. After two days of facilitated negotiation, the parties agreed not only to an acceptable allocation of costs, but the specific mitigation measures that would be undertaken. In addition disagreements with the state regulator over expected levels of clean-up were resolved. The facilitated negotiation helped to avoid potential future remediation by curtailing further contamination as well as to avoid an expensive PRP investigation.

An example of a process that provides for a more active role by the mediator is the A&E Responsibility Mediation.

#### Architectural and Engineering Responsibility Mediation

The Sacramento District entered into mediation with an architectural and engineering (A&E) firm over a \$25,000 cost borne by the Army Corps due to design errors related to the HVAC controls during construction of the Consolidated Telecommunications Facility at Hill Air Force Base. The designer called for mediation because their insurance company requested the use of ADR.

The parties jointly selected an American Arbitration Association, (AAA) mediator with extensive experience in ADR, government contracts, and engineering. A short ADR agreement was drawn up. Prior to the mediation, the counsel's office met with the responsibility coordinator and mechanical inspector to help them develop a cogent presentation of the Corps' case. The mediation included representatives from the Corps, the prime A&E, the mechanical A&E, and the insurance company. Attorneys were not present. Both parties presented their case, issue-by-issue. The mediator questioned the parties, clarified uncertainties, and focused the discussion on high-value items.



After the initial discussions, the mediator separated the parties and presented each party with his assessment of the strengths and weaknesses of their case. The mediator did not offer his opinion on an acceptable dollar figure, but solicited offers from the parties. Then the mediator began shuttling back and forth between the parties since the offers were far apart. The discussion continued, until the parties settled on a \$15,000 figure. This figure came well within the Corps' initial assessment of a fair settlement determined by the A&E Responsibility Coordinator after presentation of the facts but before dollar offers were made. After four hours, the parties had settled the claim. The A&E firm picked up the full cost of the mediation, bringing its cost to approximately \$16,000.

The Corps is also expanding beyond *ad hoc* case mediation, as described above, to design programs that handle, not one dispute, but recurring classes of disputes, such as EEO complaints.

#### Equal Employment Opportunity (EEO) Claims Mediation

The Corps has developed a Corps-wide mediation program for EEO complaints. When an employee or job applicant files a complaint, he/she is assigned an "EEO counselor". The counselor has 15 days to help resolve the problem. If this is unsuccessful, and the case passes a screening to rule out instances where mediation might be excluded by law, the EEO office offers mediation. If the disputant agrees, the formal complaint process is suspended for 60 days. The case is then assigned to

two internal mediators from another district who are higher grade Corps personnel from the District Counsel's Office, the Equal Employment Opportunity Office, and/or the Human Resources Office. Mediators have been trained together in a week long course. The mediators meet with the parties, typically in the field or district of the disputants, for one to four days. The mediators help provide a neutral setting for the employee and the supervisor, establish ground rules, and focus the parties on underlying concerns and personal relationships. If the parties settle, the written agreement is monitored by the EEO office. If the parties do not settle, the case is returned to the formal process.

The program has helped to reduce the number of formal and costly EEO complaints. In one recent fiscal quarter, 30 cases came to mediation and all but 2 settled. It is perceived by many as helping to salvage working relationships with a minimum of disruption, while getting at issues of respect and personality that often underlie EEO complaints.

The EEO process is an interesting innovation in that it represents a systems design for a stream of predictable cases. Many corporations have discussed instituting such procedures, but the Corps is ahead of the game.



### 5.2.3 Mini-Trial

The mini-trial, a more formal version of assisted negotiation, is used most often to resolve disputes over contract claims arising in military and civil construction projects. As discussed above, the neutral works together with senior decision makers of the parties who have presumably been removed from the controversy. Mini-trials range in their degree of formality. As in all mediation, the parties are in control of the process.

In mini-trials, the neutral adviser is likely to be a process or substantive expert, or both. Once each team has been formally convened, they negotiate a set of ground rules that will govern the process from start to finish. The nature and extent of informal "discovery" is established, as well as the nature of the "hearing" itself. Often process design issues are heavily negotiated by the parties with the assistance and guidance of the neutral adviser chosen. In some cases exhibits, and/or documentary evidence and witnesses may be used. . Once formal presentations are made, the senior decision makers meet, either alone, or with the neutral adviser. The neutral plays a variety of roles, offering legal or technical advice to both sides, assisting the principals in negotiating a settlement, and performing the role of mediator, as needed.

Corps staff cite several advantages to the mini-trial. First, it keeps decision-making in the hands of the parties. Second, the involvement of principals with no prior connection to the dispute helps bring objectivity to the settlement negotiations. Third, the formality of mini-trials offers a comfortable method for both the Corps and the contractor because it provides ample opportunity for preparing a cogent and thoroughly documented case based on adequate discovery. The mini-trial offers an adequate hearing of claims and comes closer to the traditional forums in which both sides are accustomed to pursuing their claims. Fourth, it is highly cost-effective when compared to full-blown litigation. However, some Corps staff have been resistant to mini-trials because they fear that decisions will be made at such high levels that the detailed facts of the case known by technical field staff will be lost. They express concern that high-level managers may be unduly influenced by skilled opposing counsel. As with "plain vanilla" mediation, concern is also expressed that the process will result in a split down the middle, rather than a decision on the merits and, consequently, the Corps will compromise its high standards. Finally, some staff express concern that the process, while less involved than litigation, is still quite elaborate.

#### Consolidated Space Operation Center Mini-Trial

In the Omaha district, the District Counsel used a mini-trial to resolve over \$22 million in contractor claims filed after the construction of a series of buildings in Colorado. On the Corps side, the District Commander was the decision-maker. The contractor selected a senior vice president of the company to serve as its decision-maker. In addition to these managers, the two parties selected a



highly respected government contract lawyer as a neutral advisor. The parties agreed, just prior to the actual mini-trial, that the neutral advisor would serve as an active member of the panel. His role would be to ask any questions he deemed pertinent as well as manage the negotiations to assure settlement. The process was confidential as is most ADR. The neutral could not be called before the Contract Board of Appeals were the process to fail and move on to formal hearings.

The parties set aside five days for the process. Sworn testimony, rules of evidence, and transcripts were waived. During the first two and one half days the attorneys representing the contractor and sub-contractors presented their case. On the third day the Corps presented its case. After several hours of cross-examination on the fourth day, the panel began negotiations that lasted into the fifth day. The negotiations centered around the cause and effect relationship between government interference and contractor losses and the accuracy of estimated costs and impacts. After the negotiations concluded, all claims but one were settled for \$3.7 million plus interest.

#### 5.2.4 Expert Fact-Finding

The Corps has used a practice known as expert fact-finding to help resolve disputes between the agency and its contractors in both Civil and Military Programs. Some disputes call for expert judgments. In these cases, expert fact-finding may be more useful than any other form of alternative dispute resolution. Ideally, a neutral expert is jointly agreed upon by the parties. He/she renders a technical and substantive opinion. In some cases, two parties agree to hire their own outside experts to review the case and to provide opinions. Although the process has been effective, there are risks if a single neutral expert is not chosen since the two experts might disagree, and prolong rather than resolve the conflict. Moreover, in a multi-party dispute, numerous experts would likely complicate the matter further.

Typically, the expert has no prior connection to the Corps or contractor. When a joint expert is hired, the cost is likely to be shared by the parties to ensure neutrality. If the case involves technical issues, the parties seek out an expert with substantial technical knowledge. In a legally-intensive dispute the parties may instead select an attorney with expertise in the disputed area of law. The parties are given an opportunity to submit a written presentation of their case, as well as any other documents to support their argument. Once the expert reviews the submittals and clarifies key points by contacting the parties, he/she issues an opinion. The parties may simply agree to this opinion, or they may use it as a basis for further negotiation. At times, fact-finding may be coupled with a structured negotiation or even serve as a prelude to a more circumscribed mediation process.

According to Corps staff, fact-finding is often effective in facilitating a quick resolution of a conflict without the need for extensive staff preparation or formal presentations. Fact-finding may be less expensive than other forms of ADR. However, fact-finding is not as useful for untangling complex,





multi-issue disputes that involve damaged relationships and poor communication as well as substantive disagreement over facts.

#### **The Little Dell Dam Expert Fact Finding**

As the construction of the \$31 million Little Dell Dam and Appurtenances just north of Salt Lake City came to a close, a potential \$30 million claim loomed. The contractor had allegedly encountered significantly different site conditions in the foundation trench of the dam than expected. They claimed that they had incurred substantial unexpected costs .

The district counsel's office decided to bring the parties together to discuss the merits of a portion of the potential \$30 million claim. Counsel utilized expert fact- finding coupled with a structured negotiation. Both sides agreed that each side would hire an independent expert in geomorphology. Both parties located former high-level private engineers with substantial engineering and management experience. In addition, the two experts knew one another. Quantum figures would not be discussed. Two days were set aside for the fact finding and subsequent negotiations. Each side presented a factual review of the case after discussions with their experts. The Corps was represented by District Counsel and the District's Chief of Construction, who looked to their consultant to provide an objective assessment of the strengths and weaknesses of their case. After the presentation, the parties developed a list of questions for the two experts. With the questions in hand, the two experts were sent into a separate room to identify substantive areas of agreement and disagreement.

While the "answers" the experts provided were not as decisive as the parties had hoped, their opinions served as a mutual starting point for direct negotiation between the parties. The negotiations led to a common understanding of the merits of the case on which a quantum settlement might be based. Furthermore, because the process had proceeded amicably, and the Corps had developed a greater appreciation of the contractor's position in the matter, the parties built trust and established credibility. The first two days of discussion were so fruitful, the parties remained an extra day to discuss other concerns.

#### **5.2.5 Non-Binding Arbitration**

Non-binding Arbitration has been used primarily to resolve contract claims in Military and Civil Works construction projects. It has also been used to settle appraisal disputes in the Real Estate Division. Non-binding arbitration is especially useful in cases of high fact intensity. It is typically used when the parties believe that less structured forms of ADR are unlikely to reach resolution. Unlike mediation or facilitation, the arbitrator renders an authoritative decision, though this decision



is not binding. In one sense, an arbitrator is like an expert fact-finder, but unlike fact-finding and the use of experts, non-binding arbitration has all the trappings of binding arbitration: discovery and presentation. Unlike a mini-trial, the arbitrators, rather than the organizations' managers, render a decision.

To undertake non-binding arbitration, the parties develop an ADR agreement that outlines the procedures that will be used during the arbitration, including the nature and length of the discovery process, the format for presenting documents and witnesses, the rules governing the proceedings, and the structure that the final decision will take. The parties also jointly select an arbitrator or a panel of arbitrators. Arbitrators are generally selected for their technical or legal expertise and professional reputation. They are often retired judges, former high-ranking managers in engineering firms or agencies, or university professors.

Upon conclusion of the discovery period, the parties formally present their case to the arbitrator. The arbitrator then, within an allotted time (usually one to thirty days), issues a decision in the form requested by the parties. Final decisions may be issued as fact-finding reports or quantum settlements. The decision may be "take-it-or-leave-it", or may serve as basis for further direct negotiations between the parties. While the decision rendered is non-binding, it generally carries substantial weight because of the expertise of the hired neutral as well as the time and expense invested in the arbitration procedure.

The advantages expressed for non-binding arbitration include, of first importance, litigation avoidance. Although lengthy, arbitration is likely to be more streamlined and faster than litigation, and therefore more cost-effective. Second, because it is non-binding, as well as quicker, it is less likely to terminate the relationship than litigation. Corps staff have also cited several disadvantages. Decisions are made at high levels without informed input by technical field staff. Decisions may be too rushed, resulting in less than a fair settlement (the same criticism can be made of all ADR.) And, because arbitration is non-binding, contractors can take "two bites from the apple" by elevating the dispute to an appeals board if they do not like the arbitrator's decision.

#### **Air Force Central Heating Plant Non-Binding Arbitration**

Following the construction of a \$32 million central heating plant for an Air Force base, the contractor filed claims totaling some \$6 million, allegedly because of delays caused by the Corps and inadequate contract specifications. While the contractor showed little interest in negotiation, upon suggestion of the Corps, the company agreed to non-binding arbitration.

Because of questions of contract law, a single arbitrator, an attorney with extensive government contract experience, was selected. Each side had approximately forty hours to present its side of the



case in front of the arbitrator. While this was an extensive amount of time, the parties agreed to this approach because of the complexity of the case. Cross-examination and rebuttal, much like in a trial, were allowed. The entire proceeding took about two weeks.

The arbitrator was instructed to produce a decision on the merits and suggest quantum settlement amounts within thirty days. The arbitrator concluded that the Corps had not caused undue delays. However, on the dispute over contract specifications, the arbitrator ruled, after a thorough reading of the contract and with his extensive knowledge of contract law, that the contractor was due some \$3.2 million. Both sides accepted the recommendation and ended the dispute.

#### 5.2.6 Dispute Review Boards

The Corps has used dispute review boards to resolve multiple conflicts that arise during the course of a Military or Civil construction project. Dispute boards involve a form of non-binding arbitration employing a panel of outside experts convened by the parties according to a mutually agreed upon process. The board meets to review the facts and arguments in a particular dispute. The parties make formal presentations, and often submit written materials to buttress their arguments. The board then meets independently to discuss the issues in the dispute, and prepares a recommendation to the parties based on their findings. This recommendation may be restricted to the merits of the case, leaving the parties to negotiate the specifics of the agreement based on the determination of merit, or it may offer specific quantum figures.

While a dispute review board bears a close similarity to both the mini-trial and non-binding arbitration, it differs in several important respects. The panel is made up of independent consultants, often with substantial technical expertise in the issues in dispute. Most important, dispute review boards are not *ad hoc*. They are designed to handle a stream of disputes. Whether they are convened at the beginning of a construction project or once the project is well underway, a board serves as a means to institutionalize a conflict resolution process during the life of a contractual relationship.

Several advantages to this method of dispute resolution are cited by Corps staff. First, a stream of disputes can be expected in large scale construction. If the Board meets throughout construction, it provides a vehicle for such disputes to be reviewed as they arise. The parties have an opportunity to present relevant information and arguments in a timely manner, before they escalate or become distorted. Second, once the contractor and Corps have brought several disputes before the Board, the parties may negotiate a resolution of claims on their own, using their experience with the Board as a guide. Third, the use of experts well versed in the technical issues, and increasingly knowledgeable about the project can encourage the parties to avoid bringing less meritorious claims.



## San Antonio Flood Control Tunnel Project, Dispute Review Board

Corps project staff decided to use a dispute review board for resolving potential claims in a \$70 million project to build two underground tunnels in downtown San Antonio. The decision was made during the design phase. In an effort to encourage the chosen contractor to use a dispute review board, the bidding documents allowed for, but did not require, its use. In the bid documents, the Board was described as a "voluntary, expedited and non-judicial and non-binding" method. The contractor could by-pass the Board and submit claims directly to the Contracting Officer.

To form the Board, the Corps and the contractor each selected a representative, and sought approval from the other party of their choice. A third Board member was chosen by the first two with the concurrence of the Corps and contractor. All three were technical experts with extensive knowledge about underground tunneling.

The Board met quarterly and as necessary at the job site. During each meeting the Board was updated on the progress of the contract and toured the site. To notify the Board of a pending dispute, a letter was first sent to the Board members. Each party prepared position papers in advance of the Board meeting. Each party then presented its case before the Board. There were opportunities for the parties to make rebuttals, and for Board members to ask questions. Once the hearing was concluded the Board met off-site to develop a recommendation. After the Board rendered a decision of merit, the parties negotiated a quantum settlement.

In total, over sixteen disputes were heard by the dispute review Board. Two of the sixteen were presented in writing just to the Board's Chairman. Through regular meetings of the Board and informal negotiations between Corps and contractor representatives prior to scheduled Board meetings, the two sides were able to resolve all potential claims by the time the project was completed.

### **5.3 Analysis**

5.3.1 ADR has played an important role in reducing the Corps's involvement in litigation and formal administrative hearings.

In the early 1980s, the number of legal claims pending against the Corps was climbing annually, and the cost and time associated with handling these claims was straining the agency's resources. In the year ending March 1985, 1266 claims valued at \$581 million and 497 appeals valued at \$365 million were pending with the Corps. In Military and Civil Programs, it was a regular practice for contractors to file a series of claims, both during and after the completion of construction, alleging



that they were owed money for lost time or unreasonable costs incurred. One District Counsel emphasized that "the number of contractor claims pending against the Corps in the early 1980s was beyond the agency's capacity to handle." This growth in claims was not restricted to the Corps interactions with contracting firms. Internally, administrative cases alleging violations of the Equal Employment and Opportunity Act were increasing as well.

ADR has helped turn this unfortunate situation around. In addition to sharply reducing the sheer number of claims headed for administrative appeal boards and litigation, thus saving costs, ADR has benefited the Corps by improving its internal and external relationships, and smoothing the way for future negotiations.

- *Cost Savings:* Before the introduction of ADR, each contractor claim was either settled through negotiations or litigated in a lengthy administrative appeals process. Not only was legal time eaten up: others' valuable technical and managerial time was also lost to judicial procedures. One resident engineer noted that up until the 1980s, "I spent a large chunk of my time fighting claims, in testifying and in preparing documents that the attorneys needed to develop the government's position."

Although not quantified, according to headquarters staff and field offices, ADR has produced substantial savings in the time spent managing conflict. In construction projects, for example, a structured negotiation or mediation might successfully resolve a dispute over a claim in several months rather than several years. While more formal forms of ADR like mini-trials and non-binding arbitration may take longer than other less formal forms, they are still much faster than litigation or administrative appeals, bypassing crowded court and administrative dockets.

Some concrete cost savings have been identified. In the EEO mediation program, for instance, informal resolution of complaints through mediation costs between \$300 and \$3,000. Processing formal complaints had generated costs between \$25,000 and \$40,000. Settlement costs via mediation are also not as unpredictable as jury awards.

ADR can also help avoid potential future costs and minimize future risks. For example, by resolving the San Marcos Landfill dispute through structured negotiation, discussed above, the parties could begin remediation of the site immediately. Earlier remediation helped to prevent leakage of contaminants into the adjacent water supply. The early resolution of the dispute also eliminated the need for a \$200,000 study to investigate degrees of liability among the PRPs as well as other expensive technical studies.

- *Improved Relationships:* Protracted legal disputes generate adversarial relationships, and often signal their demise. By contrast, ADR often significantly improves the relationship between



disputing parties. By creating a forum where disputing parties can hear, and in some cases discuss each other's perspective, ADR can foster a better understanding of the commonalities and differences in their respective interests. In turn, this can lead to improved working relationships in the future.

For example, one of the clear outcomes of the EEO mediation program has been the enhancement of working relationships between managers and staff. Under a formal complaint procedure, the complaint would be registered in the manager's personnel file. This would often spark anger on the part of the manager, exacerbating the difficulty in working collaboratively with the employee. Furthermore, the formal complaint procedure allowed parties to present their positions, but it did not encourage them to engage in dialogue about the real issues underlying the filing (i.e., an employee's frustration about having been passed over for a promotion, lack of recognition for hard work, or clashing work styles). Even after a decision was handed down, the problem often remained, and the working relationships would continue to erode. The EEO mediation program, in contrast, has helped managers and employees to resolve their disagreements by addressing the real issues underlying formal complaints. Moreover, because a painful and protracted dispute between one staff person and a manager can affect the morale of an entire office, the EEO mediation program has helped to significantly salvage and improve a number of office relationships at once.

- *Improved Future Negotiations:* Corps staff who have participated in an ADR process may, in some instances, learn important negotiating skills that help them to resolve future conflicts before legal action or ADR become necessary. ADR participants may also become more willing and enthusiastic about searching for alternatives to conventional means of resolving conflict once they have seen that an ADR process can produce a wise and fair settlement in less time than a court or administrative board. Finally, Corps staff who participate in an ADR process can sometimes, after observing a neutral render decisions in such forums as a dispute review board, develop their own abilities to assess the merits of a disagreement.

The San Antonio Tunnel Project illustrates one way that the use of ADR can improve future negotiations. In the San Antonio Tunnel Project, both the contractor and the resident engineer used their experience with a neutral body as a launching pad for improving their own negotiations. As they observed how the Board crafted recommendations in response to presentations by both sides, they developed a willingness to negotiate resolutions to their disputes even before they came before the Board. By adopting the Board's criteria for assessing claims, they began to work together to identify solutions that they could both accept. At all times, their interpretations of the likely outcome of a Board hearing served as guideposts in their negotiations.

Two other examples also help illustrate this point. In a structured negotiation organized by the Sacramento District to resolve a claim over differing site conditions, the parties were so successful at discussing the claim at stake that they remained for an extra day to resolve *other* minor disputes



that had not been on the original agenda. In the Indian Trace Community Development structured negotiation, the discussions between technical experts led to a new and more satisfactory form of habitat evaluation that has since been used to resolve other disputes. By bringing the disputing parties' technical experts to the table, the parties were able to craft a positive solution that not only resolved the current dispute, but established a precedence for resolving future similar disputes. Successful resolution of disputes through ADR often leads to further successful negotiations.

5.3.2 Dispute systems design, a systematic effort to re-engineer procedures for dispute handling, is substantially improving the work and efficiency of the Corps.

Corps managers in such areas as Regulatory and Equal Employment Opportunity have been searching for better means to resolve streams of disputes in a faster, less costly, and more productive fashion. While many ADR tools are used on a claim-by-claim basis, some ADR tools can be applied pro grammatically. This effort to systematically "re-engineer" systems for managing conflict is know as "dispute systems design."

Two examples of dispute systems design in quite different areas of the Corps offer solid evidence of the successful application of ADR to streams of disputes, rather than to single disputes. The first example illustrates the benefits that can accrue to the Corps once a new dispute handling system has been instituted. The second example shows how such a program can be established. The development of this particular program can serve as a useful model for other Corps functional divisions when they seek to implement an ADR program.

- ***The Benefits of ADR in Enforcement in the Corps' Regulatory Branch:*** An ADR system developed by the Regulatory Branch at the Jacksonville District has helped to reduce litigation, improve enforcement of the law, and provide protection for some of the nation's most valuable wetlands. Annually, the Jacksonville District must contend with approximately 200 disputes arising over the enforcement of permit conditions. When the district office receives notice of a violation from the field, Enforcement staff must prepare an extensive Violation Analysis Document (VAD) to determine if the case warrants legal action. In the past, if the case was actionable, it would be referred to the Department of Justice for litigation. Once the case was referred, it often languished for years before a trial date was set. The Enforcement staff sought a new way of handling these disputes. Enforcement was concerned that the length of time it took to resolve a case effectively reduced the threat of swift action necessary to encourage better compliance. Because any potential fines would be levied years after the violation, the cost of such fines was often discounted by violators. In the end, when a case was finally settled, the court imposed cash penalties that were paid into the federal government's general fund. The money was not earmarked to improve wetlands.





With the support of the District Commander, the Enforcement Office and District Counsel designed an intermediate step between the VAD and court. If the case was deemed actionable by the Enforcement Office and Counsel, the district would offer the parties the opportunity to participate in a structured negotiation before their case was submitted to the Department of Justice. On the first day of a three day process, the purported violator lays out his or her case to the Chief of Enforcement and the Project Manager. Attorneys are present only upon the violator's request. On the second day, the Corps lays out their case. On the third day, the Corps sets forth a set of stipulated actions designed to settle the case. The violator may accept the terms of this settlement, or move on to the formal process.

In one staff member's words, this intermediate negotiation has helped "to drastically reduce litigation." If an agreement is reached, the Corps saves substantial time and money by avoiding a protracted legal process. But other important benefits accrue as well. First, when the district resolves a case through negotiation, the penalties paid by the party who violated the permit are no longer absorbed into a general fund. Technical staff can use their environmental expertise to design settlements that support measures for mitigating damage to wetlands and restoring lost acreage.

Second, structured negotiations improve the working relationship between the Corps and its permittees, by solving disagreements over permit conditions before costly and painful litigation leads both sides into an adversarial relationship. Third, the public attention the ADR process has received in Jacksonville has raised the profile of enforcement, increasing awareness about the existence of permit conditions and the consequences of their violation. As the likelihood that the Corps will aggressively pursue violators has increased, compliance has improved. One staff member said: "Violators now know that there is a step between languishing in courts and the Corps taking action. In the past, regulatees have taken chances because the odds of prosecution were small. ADR helps the Corps increase those odds."

- ***The Development of Mediation in the Office of Equal Employment Opportunity:*** The development of the mediation program in EEO (*as described in section 5.2.2*) is a good example of how headquarters, the district, and various functional divisions can work together to re-engineer a dispute handling system. The idea for designing an EEO ADR program arose at headquarters during informal discussions between the Chief Counsel's office and the Office of EEO. Spurred on by the steady rise in the number of EEO complaints filed annually and the prospect that future downsizing would likely generate more, the two offices decided to undertake a careful assessment of how ADR could improve the handling of complaints. A Task Force was established to assess the stream of complaints and to design an ADR system that was well-suited for resolving these complaints before they entered formal grievance procedures.





The Task Force was comprised of district staff in EEO, Human Resources, and Counsel, with the Corps' Chief Trial Attorney serving as a facilitator and dispute resolution advisor. Staff in all three functional divisions had a part in processing EEO complaints, and together, rather than separately, they could design a system that fully reflected the requirements of claims processing. This task force decided which ADR tool to use (mediation), at what point in the claims process the tool would be most appropriate to introduce, what kind of outreach and training plan was necessary to implement the program, and which districts would serve as pilot sites. After a briefing to the Department of Army, the Task Force helped initiate a pilot program.

During the pilot program's implementation, the Task Force monitored the outcomes of mediation and considered potential modifications to the process as actual experiences provided further data to the dispute system designers. Over time, the Corps developed a useful, tailored, and effective ADR program. One of the key factors explaining the Task Force's success was the involvement of district level staff who had practical experience in processing EEO complaints. Another factor was the Task Force's access to the ADR expertise of the Chief Counsel's office, and their commitment to implementing the program step-by-step with frequent opportunities for gathering feedback and making on-going modifications.

### 5.3.3 Despite these successes, ADR has not been as widely accepted as partnering.

While partnering has been institutionalized in the Corps, ADR is not yet systematically used by all Corps districts. Some district offices have actively sought opportunities to use ADR when conflicts have erupted and litigation looms. These districts have built substantial knowledge about the different approaches to ADR, and have honed the skills needed to make decisions about which approach to use and when to use it. Other districts have used ADR minimally or, in some cases, have actively resisted its use all together. As one senior official stated: "I have heard a lot of negative comments about ADR from people in the field." Another noted: "ADR doesn't necessarily please people in the field." A third official emphasized that: "The field has very mixed feeling about ADR. Partnering is more accepted." One district official put it much more bluntly: "ADR leaves a bad taste in my mouth."

Through our interviews, we have identified at least five barriers that impede broader acceptance of ADR. (1) There is lack of information, and varying levels of knowledge about and experience with ADR. (2) Technical staff are ambivalent about the value of ADR because they feel it causes them to lose control over decisions. (3) ADR has received varying levels of support from different district and division counsels. (4) The linkages between partnering and ADR have often gone unrecognized. (5) Some contractors are reluctant to accept ADR.



- ***There are Differences in Levels of Knowledge and Experience about ADR:*** With few exceptions, the Corps staff that we interviewed were eager to talk about partnering. The majority had a clear understanding of partnering: what it is, how it works, and what it can achieve. However, when the discussion turned to ADR, many Corps staff were not nearly so well-informed. Some did not know what ADR was. Some understood the term generally, but were not knowledgeable about its various forms. Almost without exception, staff at headquarters could not cite recent examples of the use of ADR. This general lack of knowledge about ADR extended from headquarters to the field, from attorneys to engineers.

Without knowledge or experience, ADR is unlikely to be used. Several senior managers at headquarters pointed out that field staff who have no experience with ADR are unlikely to propose its use unless they have a clear understanding of its conceptual underpinnings and have heard success stories about its use in other offices. Furthermore, staff at the headquarters level are less likely to be active and vocal proponents of ADR if they are not privy to "war stories" about how it has been effectively implemented by field offices.

ADR's wider acceptance hinges on increasing knowledge and experience. As more and more people in the agency gain knowledge about ADR, they will become more open to experimenting with the use of ADR in their own or their subordinates' work. If this experience is positive and leads to favorable outcomes, then those staff people are likely to become advocates of ADR themselves, and to disseminate both their understanding of the concept and the story of their success to others. This is precisely the feedback mechanism that has helped partnering to gain currency throughout the Corps.

Unless headquarters, division, and district managers are trained, ADR will not be integrated more fully into the day-to-day work of the agency. More training would increase the acceptability and use of ADR. Most people we interviewed agreed that training in ADR should be more widely available. At headquarters, for instance, one attorney said: "We in the Counsel's Office need more training. We are behind our Chief Counsel in our knowledge of ADR." At the district level, for example, when asked what kind of assistance was needed to implement ADR in the Directorate of Real Estate, a district staff member responded with just one word: "Training."

- ***Technical Staff are Ambivalent About the Value of ADR:*** Technical staff throughout the agency appear to be highly uncertain about whether or not ADR is in the Corps' best interest. This ambivalence is most acute among those staff who coordinate and oversee construction projects on a day-to-day basis. It extends from field offices that have little experience with ADR to offices which have used ADR more extensively. Unfortunately, ADR is seen as the exclusive province of attorneys; many forms of ADR do not, in the view of technical staff, sufficiently involve those with the most intimate knowledge of the issues. In addition, the



process is often seen as resulting only in compromise, requiring concessions from the Corps rather than concluding in a wise and fair settlement.

- *ADR is Seen as the Province of Attorneys:* Many Corps staff believe that ADR is the exclusive province of attorneys. One headquarters staff person said: "ADR is seen as lawyers' stuff. People in the field don't feel that they can initiate an ADR process themselves." As one district staff member said: "It is our understanding that the ADR concept was proposed by the Office of Counsel, and its use continues to be restricted to that office."

Technical staff often associate the term ADR with lengthier and more formal ADR forms such as mini-trials and non-binding arbitration. Since these processes depend heavily on the involvement of attorneys to prepare and present the Corps' argument, ADR is subsequently seen as a practice that takes responsibility out of the hands of field staff and places it squarely in the hands of counsel. Technical staff seem less likely to connect ADR with more unstructured and informal means of managing collaborative problem solving that rely on their input and involvement. Despite this widely held perception, field staff have, in fact, initiated both less formal forms of ADR, such as structured negotiations, and more formal and sophisticated methods such as dispute review boards.. For example, in the Fort Worth district, a dispute review board was convened to help the engineering staff resolve disputes on the site of the construction project. It was the resident engineer from the Corps and the contractor who managed this process. No attorneys were involved at any stage of the Board's deliberations.

- *ADR Outcomes are Seen as Concessions:* Many construction personnel believe that negotiated settlements achieved through ADR are unfair to the Corps. Construction staff are convinced that trying to resolve a technical disagreement without litigation or formal administrative procedures often results in high-level Corps management "giving away the store" or "splitting the difference" (as we have indicated earlier).

Why has this perception emerged? First, by the time a district counsel has been called upon to initiate an ADR process, the construction staff have typically invested enormous amounts of time and energy in marshaling evidence to buttress the Corps' position. One District Counsel explained it this way: "A construction engineer says, for example, this contractor does not have merit to his claim. The contractor complains to the resident engineer who considers the merits, but also remembers that his employee has already said no. The resident engineer agrees with the construction engineer, and so on up the line."



Second, technical staff in the field may also be defensive that successful efforts to settle claims at higher levels of the agency will be viewed as a sign of the failure of lower level staff to identify the potential zone of agreement.

Third, engineers in the field and attorneys at the district may have very different perspectives on the same claim. As one district counsel said: "Field staff come at these issues from a completely different perspective. They are on the job every day dealing with the contract and the contractor. As far as their concerned, we don't understand the first thing about the dispute." Attorneys, however, are intimately familiar with the legal issues of the case, and how its merits compare to numerous other claims. They can assess litigation exposure and calculate the likely administrative costs of preparing for such a proceeding. At the same time, they must rely on the technical people for the factual and technical elements of a dispute

Fourth, personal predilections and professional training may set technical staff at odds with ADR. One headquarters staff noted: "Field staff tend to see disagreements with contractors in black and white terms. They forget that in almost all disputes with contractors, there are likely to be gray areas where both the contractor and the Corps may bear some of the responsibility for the issue in contention." One former field staff concurred with this point, saying: "There's discipline. Fair is fair. There is right and wrong." These aspects of the field staff perspective make such staff very wary of ADR

- ***There is Regional Variation in Support by District and Division Counsel for ADR:*** District and division counsels across the Corps appear to hold significantly different views on ADR. While a few district counsels purposefully assess most major disagreements to determine if ADR is appropriate, others rarely if ever consider utilizing ADR. One district attorney said: "I'm usually not interested in things like non-binding arbitration. I've been a lawyer for a long time and know the law pretty well. If there's an experienced attorney and good faith from the other side, we can settle without ADR. The best kind of ADR is settlement by good attorneys." In another interview, a senior manager in Military Programs said: "Its true that the technical people often resist alternative dispute resolution, but the lawyers in the Corps are sometimes equally as opposed to these tools." He illustrated this point with a recent example. Representatives of a major contractor and the Corps agreed to try ADR techniques to settle a claim. Even though the Corps had significant legal exposure and avoiding litigation was in the agency's best interest, the district attorneys were resistant. According to this manager, they left the session abruptly after half a day. He noted that had counsel been committed, they would not have exhibited such impatience with the process.



Two factors help explain this variation. First, the large, decentralized organization of the Corps has contributed to the variable use of ADR by the districts. As one District Counsel noted: "The Corps is an incredibly diverse organization, and there are big differences in the way different districts do business. In terms of ADR, this is both a strength and a weakness. It is a strength because it gives counsel the freedom to experiment with ADR and to learn from their successes and their failures. It is a weakness because this decentralized structure makes it hard to bring the lessons learned from this bold experimentation to other offices that have bigger doubts."

Second, there is a lack of widespread opportunities for ADR training for Corps attorneys. There is almost universal agreement that formal training opportunities in the various tools and techniques of ADR are far too few in number. Moreover, the fact that these training courses are offered at the national level, rather than division by division, means that the participation of legal staff will depend in large part on how the leadership of their offices responds to the notion that conflict can be successfully resolved with alternatives to litigation.

- ***The Link between Partnering and ADR has been Missed:*** Some Corps staff, ranging from senior officials at headquarters to site-based project staff, share the perception that any partnered relationship which leads to the use of an alternative dispute resolution process has failed (see *Section 3.3.5*). This perception results in pressure on the field staff to negotiate solutions to disagreements without seeking the assistance afforded by a more structured ADR process. If Corps staff firmly believe that an effort to use ADR will be viewed as a sign of failure, then they will disregard opportunities to use ADR.

The notion that ADR and partnering are complementary has not been fully realized. It is important to note, as one Division Counsel said: "Partnering helps the Corps and the contractor to identify shared interests and to build joint objectives around those interests. However, not all of these interests are the same. At various points in the course of a contractual relationship, the Corps and the contractors interests may diverge, and the key managers on either side may need to proceed to a dispute resolution process. This does not mean that partnering has failed." In order to ensure that partnering does not become an unintended obstacle to the wider acceptance of ADR, it is critical that the agency clarify and strengthen the linkage between ADR and partnering.

- ***Contractors have Sometimes been Reluctant to Accept ADR:*** Staff resistance to ADR does not wholly explain its lack of broader use. The use of ADR also requires a willing contractor. Some contractors will choose to pursue litigation, even when the Corps strongly encourages the use of ADR. While ADR clauses in contracts may require contractors to consider ADR, they cannot force heartfelt cooperation.



The reasons for contractors' reluctance are numerous. First, contractors may be reluctant to use ADR because they share many of the same concerns that Corps staff do about making concessions rather than achieving a fair settlement. Second, as one District Counsel put it: "The contractor may want to go for the brass ring." Even when the contractor suspects that the probability of winning in court is small, the possibility of obtaining a highly favorable settlement may induce the contractor to refuse ADR and pursue litigation. Third, contractors may feel more comfortable with the finality of judicial decisions. They may be skeptical about a private arbitrator. They want an "official" judge to assign blame instead. Finally, a contractor's counsel may strongly encourage litigation. Contractors' attorneys may fear that they will be blamed if the client does not like the ADR outcome.

#### 5.3.4 Leadership and flexibility have facilitated a more active use of ADR in some districts and divisions.

Although ADR has received varying levels of support, some Corps staff have actively promoted ADR. Corps staff who have initiated these efforts believe that ADR has helped disputing parties reach fair and durable agreements that are better than the disputing parties would have achieved through a legal or administrative battles. While we reviewed reasons above that some may be reluctant to try ADR, it is equally important to explore the factors that have encouraged others to rely on ADR. Two factors are important: leadership and flexibility.

- **Leadership:** There is broad agreement that active leadership is crucial in spurring the use of ADR. Strong and enthusiastic leadership from the Chief Counsel's Office and the Institute for Water Resources have been essential in the successful implementation of ADR. For example, policy statements on ADR from the last two Chiefs of Engineers have encouraged its use. Without advocates at the highest levels of the Corps, it is doubtful the agency would have been able to harness the necessary resources to institute ADR in Civil Works, Military Programs, and Equal Employment Opportunity.

Leadership has also been important at the district and division levels. Several people we interviewed emphasized that a district's willingness to try ADR depends in large part on their District Commander. In the words of one division counsel: "If the District Command doesn't support it, it won't get done. People will simply continue to view ADR as a big give away. But if the District Commander makes it known that he is committed to using alternatives to litigation wherever they are appropriate, it will get done." This view is confirmed by the fact that many of the agency's most visible efforts to organize mini-trials or non-binding arbitration were, in fact, initiated by District Commanders. Looking for ways to respond to the suggestions and encouragement of the Chief Counsel's office, these commanders urged their staffs to try a new approach to construction claims. When individual efforts succeed, staff at all levels become more receptive to integrating ADR into the Corps' traditional methods of handling disputes.



There have been other important sources of leadership. Attorneys in the counsel's office have helped educate technical staff about the potential benefits of a non-judicial approach to resolving claims. Rather than encouraging the use of ADR as an end in itself, these attorneys have convinced other Corps staff that it represents one set of tools for managing conflict that should be integrated with the full array of tools used in the past (i.e. negotiation, processing of claims through administrative channels, contract boards of appeals, and litigation). Perhaps one of the most effective means to fully utilize ADR can be seen in one division counsel's efforts to integrate it into his division's dispute handling systems. This Division Counsel systematically manages ADR's use in the offices under his jurisdiction. Once the construction staff and the contracting office have agreed that a claim cannot be settled through negotiation, the district counsel is required to carefully determine if the dispute warrants ADR. In order to make districts accountable, this same division counsel requires quarterly ADR reports and keeps in frequent contact with district counsels. This systematic approach to managing ADR has generated frequent use of ADR in construction contracts.

- **Flexibility:** District staff who have successfully launched ADR processes emphasize the importance of flexibility and creativity. They do not view ADR as a standardized formula which can be applied in any dispute. Instead, they view ADR as a set of tools which must be adapted to accommodate the unique needs of each dispute. The San Antonio dispute review board is a case in point (see *section 5.2.6*).

The dispute review board included innovative features designed by agency and contractor personnel based on their practical knowledge of large-scale construction management. For example, the contractor and the resident engineer decided to have the Board meet at the construction site. This gave the Board members a chance to tour the site and increase their understanding of the project. Field managers also kept responsibility for presenting the arguments and making the final quantum decisions in the hands of the staff who were closest to the day-to-day operations. Finally, through a carefully designed Board selection process, the Corps and the contractor were able to choose highly qualified experts in underground tunneling supported by both parties. None of these decisions were dictated from above; they were the product of field staff's flexible approach to designing an effective ADR process.

The importance of being able to carefully select one among the many forms of ADR, and then to modify and adapt that approach, cannot be overstated. ADR's inherent strength lies in its flexibility.

## **5.4 Opportunities**

We have identified the following opportunities for the expanded use of ADR in the Corps.





- **The use of ADR in settling contract claims can be expanded in those offices that have not yet fully utilized these tools.**

While ADR has been used extensively by some districts, other districts have been reluctant to follow suit. If ADR is to be used throughout the Corps, several steps must be taken. First, districts must be encouraged to consider the use of ADR during the processing of claims. Second, district counsels need more detailed training in how to recognize opportunities to use ADR, how to select an ADR procedure, how to tailor it to the needs of the situation, and how to respond to obstacles as they arise. Third, the agency needs to create mechanisms which allow enthusiastic districts to share their successes. Finally, the link between partnering and ADR needs to be more clearly established by the highest levels of the Corps.

- **Specially designed ADR procedures are needed for handling small construction claims ranging from \$100,000 to \$1 million.**

While elaborate mini-trials and non-binding arbitration have helped settle numerous large claims, particularly in Civil Works, these procedures are too involved to be used in resolving smaller construction claims. Appeals boards sometimes conduct summary trials with a binding decision for very small claims amounting to less than \$100,000. However, claims over \$100,000 typically must move through the formal appeals process. Mediation or simplified mini-trials could be tailored to claims over this \$100,000 limit and would provide an affordable alternative to the formal appeals process. The Corps ought to consider a task force to design an ADR process that fills this gap.

- **The Regulatory Branch of Civil Works could broaden the use of ADR in both permitting and enforcement.**

The Regulatory Branch in the Jacksonville District has been successful in using different types of ADR, such as structured negotiation, to resolve conflicts with federal agencies, private developers, and regulatees. While ADR is seen by some within the Regulatory Branch as a means for district staff to avoid making difficult decisions, Jacksonville's experience suggests that ADR can actually improve decision-making. The lessons learned in individual districts need to be shared with others. In addition, Regulatory Staff across the agency could benefit from interactive training designed to teach them negotiation skills as well as disputes systems design skills. Regulatory staff who are familiar with the lessons that their colleagues have learned in other parts of the country and have learned these new skills, will be far more likely to recognize and grasp opportunities for designing and implementing innovative ADR processes.

- **The Real Estate Division has numerous disputes which may be amenable to solution through ADR.**





Some disputes in the Real Estate directorate may be amenable to ADR. These do not include disputes over the valuation of condemned property which are handled by the U.S. Attorney as mandated by Congressional statute and the Constitution. However, several kinds of conflict that emerge in this directorate might be better handled by alternative dispute resolution processes. These include: (1) disputes over the determination of rights-of-way; (2) disputes over the value of real estate which local sponsors give to the Corps in order to fulfill part of their financial liability for cost-shared projects; and (3) disagreements that arise in the context of contractual relationships managed by this directorate, such as long-term leases with the owners of private property or leases on government property made with private entities. Arbitration may be particularly well suited to negotiations that reach an impasse over valuation of property. The recommendation of an expert in land values can be an important step towards identifying a zone of possible agreement.

## **5.5 Next Steps**

The Corps has been one of the prime innovators in the use of ADR when compared to both other federal agencies and the private sector. However, after a decade of experience, the full value of ADR is yet to be realized within the Corps. In order to leave behind a legacy of innovative ADR use that will continue, the top leaders of the Corps need to provide more "focused" support for wider application of ADR techniques. This support should aim at giving field staff the encouragement, the resources, and the skills that they need.

Unlike partnering, which fits well into the existing procedures for implementing construction contracts, ADR is an alternative, structured process to supplement existing claims procedures. Consequently, ADR requires specialized expertise to initiate. This expertise includes relatively straight-forward knowledge about how to locate and evaluate potential neutrals. But it also requires a more sophisticated set of skills needed to analyze existing conflicts and conflict handling mechanisms, and to design more efficient, effective procedures. Expanding the use of ADR to districts and divisions that have not yet employed these tools will require concrete, purposeful steps on the part of senior managers.

We recommend the following.

### **5.5.1 Provide training for attorneys in the Chief Counsel's office and in districts.**

Several attorneys within the Chief Counsel's office voiced their hope that there would soon be training in ADR available for attorneys at headquarters. Such training would assist the Chief Counsel's staff to play a more active leadership role in advocating for and providing technical



assistance in the use of ADR (*this training was undertaken during 1995 while this report was in review*).

Training is also necessary for the staff of district counsels. Training for attorneys at the district level should be especially designed to prepare them for the role they are likely to play in the initiation and coordination of an ADR process. The course should address such issues as: how to identify opportunities for the use of ADR; how to decide which form of ADR is most appropriate for a given dispute; how to propose its use to disputing parties; how to select a facilitator; how to organize and facilitate an ADR process once underway; and, how to address the concerns of field staff and encourage their participation in the procedure.

#### 5.5.2 Provide basic training in ADR for technical and regulatory staff.

Basic training for technical staff, including resident and area engineers, can help overcome resistance to ADR. Due to cost constraints, it may be advisable to incorporate ADR training for technical staff into other more general training programs. Training materials should explicitly address the numerous concerns of technical staff about ADR initiated at the district level. The training could include a more thorough explanation of why and how counsel selects ADR and a discussion of the costs and benefits associated with the formal appeals process and litigation. The training should also introduce technical staff to the forms of ADR which could be initiated by field staff, such as structured negotiation, fact-finding, or mediation. Finally, it should help technical staff link the concepts of partnering and ADR.

While there are clear opportunities to apply ADR in the work of the Corps' Regulatory Branch, any effort to train regulatory staff in ADR techniques must take account of the unique aspects of the regulator-regulatee relationship. Regulatory staff need training especially tailored to their mandate. Case studies based on the actual experiences of regulatory staff ought to be used. Training should offer practical guidance on how to choose an ADR procedure, how to set up that procedure, how to assess whether a neutral facilitator would benefit the process, how to select a facilitator, and what to do in the middle of a process when troubles arise. Training across districts would help staff share the lessons learned over the past several years in individual districts.

#### 5.5.3 Provide training in dispute systems design for top level managers.

In some cases, managers may be familiar with the procedural elements of the basic forms of ADR, but they are uncertain about how to tailor these procedures to the kinds of conflicts that their offices confront on a regular basis. Knowing how to design an ADR process that is uniquely suited to a stream of particular disputes requires skills in dispute systems design.



Training programs for Counsel and for other staff who play a key role in handling disputes (such as Chiefs of Construction, Contracting Officers, and Chiefs of the Regulatory Branch) ought to focus on disputes systems design. This would entail teaching managers how to think about conflicts systematically, how to critically assess existing procedures for processing disputes, and how to design better dispute handling mechanisms. It would also involve giving managers the know-how to adjust the elements of an ADR process so that they are well suited to the unique characteristics of the disputes they must shepherd through the system.

5.5.4 Utilize a train-the-trainer models to save resources and provide numerous staff training.

One cost effective means of increasing opportunities for training is to develop a "train the trainer" program. Officials in the division offices could be brought to a central location for an ADR training that would focus on giving them the skills they need to replicate such training Corps-wide. They would then provide regular staff training courses in their own divisions, and would actively encourage district offices to send key staff members.

5.5.5 Build resident expertise in ADR through ADR advisors, ADR teams, and a mentoring program.

As the use of ADR grows, and the needs of various programs increase, the Chief Counsel's office ought to consider creating a new position: ADR Advisor. This specialist should be an expert in disputes system design and well-informed about the many activities of the Corps. He or she could design and teach training courses, offer expert advice, and help gather and disseminate data on ADR in the Corps. Most importantly, the ADR advisor could assist the agency in recognizing new opportunities to expand the use of ADR to geographic or functional areas that have not yet gained experience with these tools.

Informal ADR teams can also play a key role in integrating ADR techniques and procedures into well-designed systems for handling disputes. The EEO mediation program offers a model for how to use an ADR team. EEO established ADR teams in all the district offices to help them integrate the option of mediation into existing procedures for processing EEO claims. The teams included Counsel, Human Resources staff, and EEO staff. These key players received intensive ADR training to prepare them for serving as expert advisors to district and field staff about mediation.

The Corps should also establish a mentoring program to link attorneys who have extensive experience with ADR and those who have little or none. As one District Counsel pointed out: "It is one thing to learn the concepts of ADR in the classroom, but is another thing to actually apply and tailor those concepts to a real dispute. There are many attorneys in the Corps who don't yet have



direct experience with ADR, and could benefit enormously from the advice and guidance of one of the more experienced attorneys." A mentoring program could provide an effective way to enhance the knowledge and, perhaps more importantly, the confidence of legal staff.

5.5.6 Urge districts to consider utilizing ADR during the standard processing of claims.

Expanding the use ADR in construction claims would require that each district develop formal means for either counsel or the contracting officer to make ADR part of its standard procedures for reviewing and handling claims. At the present time, as one Corps attorney said: "No one is accountable to anyone else for doing, or not doing, ADR. ADR's further use will require accountability." To improve accountability, a district counsel could be asked, for example, upon receipt of each notice of appeal for a claim, to make a recommendation to division counsel regarding the advisability of using ADR.

5.5.7 Establish a task force to develop appropriate ADR procedures for smaller claims.

In order to explore how ADR could be applied to small claims, the Corps should establish a special task force. Its charge would be to design ADR procedures for settling smaller claims (between \$100,000 and \$1 million). This task force could also consider a partnering program for small contracts. The task force ought to include district chiefs of construction and district counsels who typically have responsibility for a number of smaller contracts. At least one, if not more, resident engineers should serve on the task force.

5.5.8 Explore the potential for the use of ADR in the Real Estate Directorate.

Because many Real Estate staff know so little about ADR, it is difficult to assess specific opportunities at this time. In order to explore opportunities, the agency should conduct a conflict assessment in the Real Estate Directorate. This assessment should include interviews with managers from headquarters and division and district offices across the country. It would inventory and analyze the kinds of disputes that the directorate must contend with on a regular basis, and identify where there may be opportunities to implement alternative methods of handling these conflicts.

5.5.9 Promote internal communication within the Corps about ADR.

The Corps ought to identify and support new mechanisms to facilitate the exchange of information about ADR. For instance, current newsletters published for district counsels ought to include "ADR Notes" much like the "Partnering Notes" in the Military Programs' Construction News.



In addition, the Corps could encourage the lateral exchange of information and ideas through its new electronic mail system. Within the network, the Corps could set up "electronic conferences" for people who share the same functional titles. Electronic conferences provide a central place where geographically dispersed people can exchange mail, post notices, discuss ideas and experiences, and issue requests for information or advice.

The Corps should also encourage informal networking at ADR and other training courses. Numerous Corps staff have mentioned that often the most valuable part of training is the time between formal sessions when they have an opportunity to converse with colleagues. This kind of informal information exchange should be built into ADR training agendas, and other meetings which addresses topics related to conflict resolution strategies.



## **6 - CONCLUSION**

### **6.1 Overview**

The Corps can-do attitude has spurred the development of effective ways of resolving painful, costly, and wasteful disputes. Through its use of partnering, consensus building, and alternative dispute resolution, the Corps has learned that conflict is neither inevitable nor unresolvable. Partnering has been used extensively in hundreds of projects to help improve relationships, better coordinate work, and prevent conflict. Consensus building, a means to prevent and resolve conflict through face-to-face negotiations among stakeholders, has been used to generate widespread community support for the Corps' plans, projects, and permits. Alternative dispute resolution, from structured negotiations to highly specialized mini-trials, has been employed to resolve numerous disputes over construction claims, environmental clean-ups, and the granting of regulatory permits. The Corps has consistently been an innovator among federal agencies in applying these techniques to ensure cost-efficient and timely results.

However, in this time of agency downsizing, diminishing resources and increasing workloads, these collaborative techniques are even more important. They could and must be used more aggressively. As we noted in the introduction to this report, our interviews suggest that the Corps stands at a crossroads. Will these techniques continue to be used in some, but not all, districts and divisions? Or, will the Corps find ways of further institutionalizing these techniques, giving them wide enough currency to ensure that the agency can prevent floods, construct military structures, keep navigable waterways well-maintained, and protect wetlands without getting bogged down in costly litigation and inter-agency squabbling? We have recommended a course of action to ensure the latter.

### **6.2 Opportunities**

We have identified the following opportunities for the future use of partnering, consensus building, and ADR.

#### **Partnering**

- Partnering can be used to improve relationships between the Corps and other federal and state agencies with overlapping regulatory mandates.



- Partnering can be extended to relationships between the Corps and its contractors when smaller contracts ranging from \$100,000 to \$1 million are at stake.
- Partnering can help the Corps to develop a better relationship with local cost-sharers.

#### Consensus Building

- Consensus building can be used to improve the preparation of reconnaissance studies.
- Consensus building can be used at various stages in the development of projects, from the preparation of feasibility studies through final design and construction.
- Consensus building in general permitting and policy-making can aid the Regulatory Branch of Civil Works in protecting the nation's wetlands.

#### Alternative Dispute Resolution

- The use of ADR in settling contract claims can be expanded in those offices that have not yet fully utilized these tools.
- Specially designed ADR procedures are needed for handling small construction claims ranging from \$100,000 to \$1 million.
- The Regulatory Branch of Civil Works could broaden the use of ADR in both permitting and enforcement
- The Real Estate Division has numerous disputes which may be amenable to ADR.

### **6.3 Recommendations**

We have developed the following recommendations. We emphasize top level action and training for field and district staff. The Corps may not be able to implement each and every step we suggest. Senior managers must allocate scarce resources carefully. It is important, though, that the long-term "return" on investment that these techniques provide not be ignored. Return should be measured in terms of improved working relationships and enhanced agency reputation, and not just in terms of time and money.



### 6.3.1 Leadership

If partnering, consensus building, and ADR are to be incorporated into these day-to-day work of the Corps, senior managers, in addition to the Chief Counsel, Director of EEO, and Chief of Military Construction, must exercise leadership. While tools will be used in the field and at the district level, Corps managers who initiate, adapt, and implement these tools need assistance from headquarters. Senior managers can clarify and reinforce the use of these techniques. They can persuade and encourage those district offices that have not yet tried out these approaches. They can recognize Corps personnel who have been successful in preventing or reducing conflict, ensuring that innovations become models for the rest of the organization. Finally, they can supply sufficient resources to carry out the work that needs to be done. To exercise leadership, the Corps should:

- Issue a policy statement setting expectations about the benefits of partnering and making explicit the link between partnering's goal of conflict prevention and ADR's goal of conflict resolution.
- Revise and reissue Regulatory Guidance Letter 87-4 to provide-up-to-date guidance for regulatory staff.
- Urge district commanders, counsels, and contract officers to consider using ADR as part of the standard processing and evaluation of claims.
- Recognize the project manager's role in improving the agency's complex relationships with customers and stakeholders.
- Develop and clarify the concept of consensus building through a pamphlet prepared by IWR similar to the Working Paper series on ADR.
- Develop a brief version of this report for widespread dissemination throughout the agency.

### 6.3.2 Internal Communication

The Corps needs to ensure that staff have ample opportunities to communicate with one another about the lessons learned, mistakes made, and successes achieved in the implementation of partnering, consensus building, and ADR. Currently, staff working in different functional and geographic areas of the Corps do not have sufficient opportunities to learn from their colleagues.





- Encourage the use of specific "notes" on partnering, consensus building, and ADR in existing newsletters, using "Partnering Notes" in the Military Program's Construction News as a model.
- Establish an electronic bulletin board to host discussions about these techniques on the agency's new electronic mail system. Each group of personnel (e.g. project managers, study managers, or regulatory staff) should have their own bulletin board, enabling them to communicate with colleagues around the country.
- Provide opportunities for networking at numerous Corps' conferences and trainings through lunches, breaks, and evening activities focused specifically on these three techniques.
- Prepare case studies on consensus building efforts in Regulatory, Project Management, and Planning.

#### 6.3.3 External Communication

The Corps should continue to build, maintain, and improve relationships with its numerous customers and regulatees, and with other federal and state agencies. To help accomplish this, the Corps should:

- Sponsor a national conference for Regulatory staff and their constituents. The Portland District's Environmental Advisory Board and the recent national conference for Corps customers sponsored by the Division of Programs and Project Management could serve as models.
- Partner with other federal agencies such as the EPA, Fish and Wildlife, and the Federal Highway Administration, that have similar or overlapping authorities. The national and regional partnering between the Corps and numerous ports across the country could serve as a useful model for these efforts.

#### 6.3.4 Skill-Building

Without a toolbox of skills, staff will be ill-prepared to implement new approaches to preventing and resolving conflict. The skills needed include: (1) nuts and bolts techniques for negotiation, agenda planning, meeting management, facilitation, and dealing with difficult people; (2) more comprehensive process design skills; and, (3) even more sophisticated skills in dispute systems design which prepare staff to design comprehensive programs for managing streams of reoccurring



disputes. The Corps ought to consider a train-the-trainer model to save money and make training opportunities available to the widest possible circle of people within the agency.

To develop nuts and bolts skills, the Corps ought to:

- Train Regulatory, Project Management, and Planning staff in basic negotiation, meeting management, and facilitation through tailored training centered around case studies and simulations that draw from the day-to-day experiences of the trainees.
- Train Division and District attorneys in ADR theory, techniques, and implementation. Such training should stress ways of overcoming internal and external resistance to the use of ADR.
- Train Construction and Regulatory staff in the basic elements of ADR, preferably incorporating this training into more general training efforts.

To develop process skills, the Corps ought to:

- Train Project Managers, Chiefs of Planning, and Chiefs of the Regulatory Branch on how to design consensus building processes. Such training would stress conflict assessment, facilitation, group dynamics, and media relations.

To develop sophisticated disputes systems design skills, the Corps ought to:

- Train key managers who by virtue of their position handle numerous disputes across many projects (such as Contracting Officers and District and Division Counsels) in the methods of dispute systems design.

#### 6.3.5 Resident Expertise

While training is essential, specialized advisors are needed to provide encouragement and support, and to serve as a resource for others within the agency. In order to establish resident expertise, the Corps ought to:

- Create an ADR Advisor position in the Chief Counsel's office to teach training courses, provide advice, and pursue evaluation of Corps dispute resolution efforts.
- Utilize dispute resolution teams. A dispute resolution team should be established to develop a partnering and ADR program for small construction contracts and claims administration.



The ADR Teams used to develop and implement the EEO mediation program can serve as a model.

- Establish a mentoring program to link attorneys experienced in ADR with other attorneys who have little to no experience with these techniques.

#### 6.3.6 Professional Assistance

Corps staff need help identifying and evaluating potential facilitators, mediators, and dispute systems design consultants. The Corps should:

- Prepare a "consumer guide" for interested Corps staff summarizing the most important qualifications to look for in a neutral (see *Appendix C* for a sample guide from the Ohio Commission on Dispute Resolution).
- Each division or district should prepare a directory of neutrals in their area who have the experience and skills to effectively orchestrate partnering, consensus building, and ADR. In order to avoid bidding complications, the directory would include all firms who wanted to be listed as long as they provided the basic information regarding educational background, past experience, services offered, and references.
- The Corps ought to provide staff in the field and in the districts a standard evaluation form for reviewing the work of neutrals.

#### 6.3.7 Critical Reflection

Monitoring and evaluation of existing programs are essential. While management must take care to respect the decentralized nature of the Corps, gathering more specific data on past efforts is important. The Corps ought to:

- Systematize data collection and analysis of partnering and ADR.
- Prepare additional case studies that highlight both the strengths and weaknesses of specific partnering, consensus building, and ADR techniques.



## **APPENDIX A**

### **INTERVIEW QUESTIONS FOR HEADQUARTERS**

#### **Using Alternative Dispute Resolution (ADR) and Partnering to Better Accomplish the Corps' Mission**

*Please find below questions that will serve as the framework for discussion in an upcoming interview with you. We are providing the questions in advance in order to give you an opportunity to consider your responses prior to our conversation.*

#### **I. MISSION AND SCOPE**

- 1) What does your directorate or division of the Corps do? What is your mission and scope of responsibility?

#### **II. IMPEDIMENTS TO FULFILLING THIS MISSION**

- 1) What are major roadblocks or obstacles to fulfilling your mission?



- 2) Can you give us examples of disagreements or disputes that typically arise (internal disputes and/or external disputes with other governmental agencies, contractors and sub-contractors, employees, unions, advocacy groups or the public)?

### **III. PAST AND CURRENT ADR & PARTNERING EFFORTS**

- 1) Have any form of dispute resolution and/or Partnering been used before in you division or directorate? Can you give us some examples?
  - a.
  - b.
  - c.
  - d.
- 2) Are any types of alternative dispute resolution and/or Partnering used regularly? If so, how were they started? Who initiated them? What resistance did they encounter?



- 3) Were there problems that arose during implementation?
  
  
  
  
  
  
  
  
  
  
- 4) How would you assess the results of these dispute resolution and conflict prevention efforts?  
Are there any measurable criteria that are used or could be used in making this assessment?
  
  
  
  
  
  
  
  
  
  
- 5) Have employees in your division or directorate been trained in alternative dispute resolution?  
If so, who was trained? Who provided the training? What did the training entail? What  
were the outcomes of this training?
  
  
  
  
  
  
  
  
  
  
- 6) Based on this experience, what are the barriers that prevent wider usage of alternative dispute  
resolution and/or Partnering?
  - a.
  
  
  
  
  
  
  
  
  
  
  - b.
  
  
  
  
  
  
  
  
  
  
  - c.
  
  
  
  
  
  
  
  
  
  
  - d.

- 1) What do you and others in your division need to see before you'd be comfortable using ADR and/or Partnering on a regular basis?
- 2) What kind of assistance would be most helpful in making good decisions about when to use alternative dispute resolution and Partnering and what types to use?
- 3) If you think you'd like to implement ADR and/or Partnering in your directorate or division, what kinds of assistance would be useful in getting started?



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## **APPENDIX B**

### **INTERVIEW QUESTIONS FOR DISTRICT & FIELD PERSONNEL**

#### **Using Alternative Dispute Resolution (ADR) and Partnering to Better Accomplish the Corps' Mission**

*Please find below questions that will serve as the framework for discussion in an upcoming interview with you. We are providing the questions in advance in order to give you an opportunity to consider your responses prior to our conversation.*

#### **I. MISSION AND SCOPE**

- 1) What is your mission and scope of responsibility? Please briefly tell us what you and your office do.

#### **II. PAST AND CURRENT ADR & PARTNERING EFFORTS**

- 1) Can you give us some specific examples of Partnering and/or dispute resolution that you have used before? ADR efforts might include facilitation, mediation, mini-trials or non-binding arbitration.



- 2) Could you tell us more about these experiences?
  - a. Who initiated the use of Partnering or ADR?
  - b. What kinds of concerns were raised about using this technique once it was suggested?
  - c. What kinds of problems arose during implementation?
- 3) Would you consider the results of these Partnering and/or dispute resolution efforts a success? If so, why? If not, why not?

### **III. NEW ADR & PARTNERING OPPORTUNITIES TO BETTER ACCOMPLISH THE CORPS' MISSION**

- 1) If you are currently using Partnering and/or ADR, what kinds of further assistance do you need from the Institute for Water Resources, the Chief Counsel's Office, or others?
- 2) If you are not currently using Partnering and/or ADR, what do you and others in your division need to see before you'd be comfortable using Partnering and/or ADR on a regular basis?



*Partnering, Consensus Building, and  
Alternative Dispute Resolution*

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- 3) What kind of assistance would be most helpful in making good decisions about when to use Partnering and ADR, and what types to use? Are case study materials useful to you?
  
  
  
  
  
  
  
  
  
  
- 4) Have employees in your division or directorate been trained in alternative dispute resolution? If so, who was trained? Who provided the training? What did the training entail? What were the outcomes of the this training?
  
  
  
  
  
  
  
  
  
  
- 5) Are there are other people in field offices who might provide us with additional information or insights in response to these questions?





## **APPENDIX C**

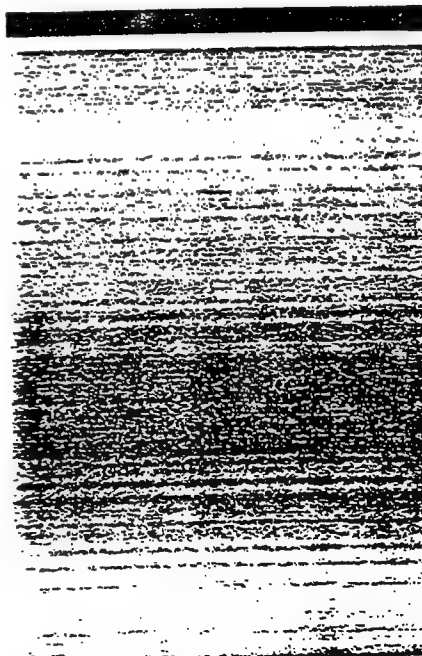
### **A Consumer's Guide to Selecting Third parties to Help Resolve Public Conflicts**



**A Consumer's  
Guide to  
Selecting Third  
Parties to Help  
Resolve Public  
Conflicts**



**Ohio Commission on Dispute  
Resolution and Conflict Management**





Conflict seems increasingly to be a part of our lives as our society grows more diverse and the issues we face more complex. Members of families, neighborhoods, and communities find themselves at odds with one another. Public agencies grapple with controversies ranging from solid waste management to funding education just as financial problems are forcing consideration of cutbacks in services. Sometimes public officials think that by postponing crucial decisions they may be able to avoid conflict, only to have difficult problems turn into seemingly impossible ones...







## *Partnering, Consensus Building, and Alternative Dispute Resolution*

...Often people wait too long before they think about getting professional help to resolve a conflict or dispute. They only turn to an outsider for help after all else has failed. At that point, the situation has often deteriorated so far that even an outside party will have difficulty getting people to talk to one another. Today, many public leaders recognize the advantage of involving third parties, skilled in managing conflict, early enough to anticipate where problems may arise and help the contending parties work through those problems.

Before hiring a third party with the skills and experience to help people communicate more effectively, to assist in resolving a local conflict, it may be helpful to have some idea about the kinds of assistance that are available, and how to locate, evaluate, hire, and work with third party consultants.

There are a variety of ways that different individuals and organizations can provide help with problem solving or conflict resolution. Different professionals use different approaches, depending on their background and experience. Some focus on the use of collaborative problem solving or consensus building processes and describe their roles as facilitators. Others are known as mediators or arbitrators.



Below are descriptions of the most common kinds of assistance third parties can provide to resolve public conflicts.

### **ASSESSING CONFLICTS:**

The initial stage of a dispute resolution process is an assessment of the problem. An impartial third party gathers and analyzes information about the problem to help sort out the issues, evaluate the effectiveness of current procedures where needed, and identify possible alternatives for resolving the problem. In some cases this may be enough. For example, in a dispute between a development agency and local citizens over an economic development plan, clarifying the issues and objectives helped identify enough common concerns to enable the parties to settle the difficulty themselves. More commonly, assessment is only a first step.

### **DESIGNING PROCESSES:**

Sometimes, parties whose views about an issue are at variance, need a process for working jointly to define the problem, gather and exchange information, generate options, and develop objective criteria in order to arrive at implementable decisions. When issues require wider public involvement to be usefully addressed and broad-based support to be successfully acted upon, these kinds of approaches are useful to building consensus. For example, where a number of government agencies are trying to coordinate services, or a community is developing a comprehensive land-use plan or trying to site a landfill, these steps have produced agreements. A recommended process may be as general as the organization of community forums or as specific as deciding who needs to be at the table and what data are needed. Once a process is designed, it can sometimes be carried out without further assistance from a third



party depending on the problem-solving knowledge and experience the group has and the complexity of the issues. If the group does not have that kind of background and experience, a third party may be needed to manage the process.

#### **MANAGING PROCESSES:**

Sometimes help is required from a third party to bring all the parties to the table and guide them through a process to solve a problem or negotiate an agreement. If help is needed to gain effective participation and communication and build consensus, the group may be aided by a third party facilitator. Or the third party may act as a mediator, using a structured process to help disputing parties communicate more constructively to reach a mutually acceptable agreement. Recently a mediator assisted the Cuyahoga County Commissioners and the mayor of Cleveland in reaching agreement on how to govern operations of their new sports stadium and entertainment complex. In particularly contentious situations where people are not talking to each other, the third party may need to work with the contending parties individually to lower tensions and improve communications before they try to sit down together to resolve their issues.

#### **DESIGNING CONFLICT RESOLUTION SYSTEMS:**

Sometimes the issue is not one dispute, but a recurring series of disputes in a community or agency or between government agencies. The consequences may range from bureaucratic gridlock and high legal costs to poor productivity and strained relationships. Some communities, for example, are faced with such growth pressures that every time a new housing or commercial development is proposed, a controversy erupts that leaves all parties feeling abused. Or agencies may find

themselves in repeated legal battles over particular rules or procedures. A third party can help design a conflict resolution system to address these kinds of ongoing conflicts more productively.

#### **COACHING, TRAINING, AND TEAM BUILDING:**

Oftentimes, public officials will identify a need to improve their conflict resolution skills so they can work more effectively with each other and with the public. Third parties can provide this kind of assistance in different ways. Coaching is often appropriate for a small number of officials who are about to enter a negotiation or a particularly contentious series of meetings. Training courses are particularly useful for groups trying to work together collaboratively, especially when they represent different organizations and perspectives. Ongoing work groups may benefit from a team building approach where there are problems with working relationships.

These kinds of services are not mutually exclusive, nor is this list exhaustive. The best processes are tailored to a particular context, community, agency, and/or issue. These approaches are offered to enable you to think about how the various alternatives could serve your needs.

The first step is to decide what the third party is going to be asked to do. Is help needed to get people together to solve a current problem? Or is help needed to generally assess the situation to decide what needs to be done? Will you need to discuss these questions with others who are going to be involved in selecting the consultant?



### SELECTING POTENTIAL THIRD PARTIES

The next step is to decide how to go about selecting a third party. Will it be necessary to involve others in the selection process so that they will support the choice? Some communities have used selection teams. Some public agencies have shared information about potential third parties with the involved groups and asked for their opinions. Sometimes a third party has been retained by one of the parties with the understanding that the group has the right to discharge them if they prove unsatisfactory.

After defining what needs a third party could serve and how you will go about selecting someone, potential candidates should be identified. Is there someone in the community or agency who has the skills, credibility, and reputation for impartiality needed for a successful intervention? Or will there be an advantage to having some help from outside the community or agency in resolving the problem?

Some individuals and organizations that provide third party services are experienced in every approach described above. More commonly, the third party may specialize in one or more of the approaches. Developing a list of potential candidates can be a time consuming process. The Commission is one source of information about third parties with experience in helping groups resolve policy problems. We will make referrals by phone (614/752-9595) or in writing if you describe what the situation is and what kind of third party assistance is needed.

In deciding on potential candidates, consider their:

- ☒ Experience
- ☒ Knowledge
- ☒ References
- ☒ Personality

- **Experience working with groups similar to yours.** Get names of references for groups they have worked with in similar situations and talk with them.
- **Experience dealing with similar kinds of issues or problems.** This is an especially important consideration where the issue is complex or highly technical. It may be less important in matters more related to planning, setting goals or establishing priorities.
- **Background and special skills.** Specific skills the person brings may be helpful in several ways, or they might present some problem or conflict of interest.



The following kinds of questions may be helpful in assessing the candidates:

**EXPERIENCE:**

What is your general experience? What is your experience with situations like this? With participants like ours? How long did those processes take? What kinds of outcomes were achieved?

**PROCESS:**

Do you specialize in one approach? Describe what kind of process you usually use in these circumstances. What are some things that would not work here? Why?

**ROLES:**

What role will you play and what impact do you want to have on the outcomes here? Do you think we have the necessary groups involved? If not, what do you suggest?

**SUBSTANCE:**

What kind of knowledge do you have about the issues to be discussed? If you do not have specific knowledge, how will you get it?

**LOGISTICS:**

How can the parties get in touch with you? What kind of staff will be assisting you? Will you always be available? Will you handle logistical arrangements for meetings? What kind of help will you need?

**COSTS?**

How do you charge for your services? How would you estimate the costs for this project? How could costs be kept low?

Here are some suggestions for evaluating interviewees' responses:

- What approach would they take to managing this kind of situation? Did they describe how they would tailor their approach to fit your circumstances? Could they discuss the advantages and disadvantages of different approaches?
- What knowledge did they seem to have of the context, the politics, the relationships? Are there any conflicts of interest?
- How did they interact, or how do you think they will interact with the different constituencies that are going to be part of the process? Will they be able to gain the confidence of the participants?
- What kind of listeners are they?
- Will their styles be compatible? How neutral do you think they will remain on the issues? Do you think they will be good at encouraging participants to come up with their own solutions?
- Are they going to be available when you need them?
- Did they ask good questions? Did they seem able to grasp the situation?
- What kind of personality did they project? Did they have a sense of humor? Did they seem patient? Flexible?



### **CONTRACTING AND WORKING WITH THIRD PARTIES**

Once a third party has been decided upon, you will want to negotiate a contract. In entering a contract for dispute resolution or problem-solving services, it may be useful to separate the work into two phases, especially in a situation where the issues are complex or there are multiple parties. The first phase is the assessment and design phase; the second, the implementation phase. Will there be an issue among the participants about who contracts with and pays for the third party services? The third party may have suggestions about how to handle those kinds of issues. Or, you can consult the Commission.

Since third parties come from a variety of institutional bases and have very different backgrounds and qualifications, there may be a wide discrepancy in the costs of their services. It is usually wise to reserve consideration of the cost factors until you have had the opportunity to determine which candidates have the most appropriate experiences, skills, and personality attributes. Once those candidates are identified, you will want to discuss their costs with them. Some third parties charge different rates for different kinds of service.

If you must use a request for proposal (RFP) to hire a third party, it will be useful to outline your problem and your objectives as clearly as possible and draw upon the respondents expertise by asking them to state in some detail how they propose to resolve the problem, rather than trying to spell out how they should go about the process. Ask them to discuss the approach they intend to use and to describe the scope, duration, and cost of the activities they propose. If it is an RFP for training or team-building, it may be desirable to state your requirements with more specificity.

If the contract is for a long-term process it may be wise to build in a time for mid-course evaluation and correction. It is not unusual, even in the most carefully thought-out process, to learn that some things are working and some need improvement. Planning for a time when everyone involved can objectively assess the situation, discuss and agree to needed changes, can help renew the commitment and enthusiasm for the process.

### **FOR FURTHER INFORMATION, PLEASE CONTACT:**

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on Dispute Resolution &  
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Columbus, Ohio 43266-0124  
Phone: 614/752-9595**



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